

# **Public Defense Services Commission**

## **Strategic Plan 2016 – 2021**

**August 2016**

### **Background**

The Public Defense Services Commission (PDSC) solicited input from over 17 separate stakeholder groups when preparing the 2016-2021 strategic plan<sup>1</sup> and dedicated significant time to public testimony regarding the future of public defense. Its October 2015 meeting was largely devoted to receiving input from public defense providers from around the state, and much of its December 2015 meeting was dedicated to the Commission's own discussion of the future of public defense in Oregon.

Several themes arose throughout the course of these discussions. One consistent theme revolved around the need for reduced caseloads among public defense providers so that clients get adequate time with their lawyers, and lawyers have sufficient time to prepare cases and meet performance standards. Also noted as a high priority was increased access to technology for improved data reporting and analysis, and effective case management (including the storage of increasing amounts of electronic discovery – particularly media files associated with body cameras and other video surveillance). Contractors, system partners, and Commission members also identified a need for better access to social services for clients, a greater percentage of whom seem to struggle with issues related to extreme poverty, mental health, and substance abuse. There was also discussion about the increasing need for expert services, particularly in the area of forensic science, in response to rapid advancements in brain science. With this and other advancements in data collection, science, and the law, many identified a need for more consistent training for public defense lawyers. There were multiple comments about the importance of improved representation and oversight at the trial level in all case types, but particularly in juvenile delinquency cases. Additionally, many commented on the continuing need to advocate for system efficiencies and improvements at state and local levels. As in past years, there was also an emphasis on the need for contract rates that allow contractors to meet rising costs of business, and improve their ability to attract and retain a diverse cadre of qualified lawyers. Finally, OPDS employees focused on the importance of maintaining excellence and

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<sup>1</sup> The following entities were invited to provide feedback: public defense contract providers, Oregon Judicial Department, Supreme Court, Oregon Court of Appeals, trial Judges, legislators, Governor's policy advisors, Criminal Justice Commission, Department of Corrections, Department of Human Services - Child Welfare, Oregon Department of Justice, Oregon district attorneys, Oregon Youth Authority, Juvenile Directors, Community Corrections Directors, Public Defense Service Commission members, and Office of Public Defense staff.

competitive pay structures to attract and retain qualified lawyers, increasing its ability to provide statewide quality assurance, succession planning for experience support staff, alleviating crowded working conditions, and improved technology to support its contract and appellate functions.

The goals and strategies in this plan are informed by the input received, as well as the Commission's statutory responsibilities, and its vision, mission, values, policies, and standards. After discussion and consideration at the June 2016 PDSC meeting, the plan was adopted by the Commission at its [TBD] meeting.

## **Mission**

The Commission ensures that eligible individuals have timely access to legal services, consistent with Oregon and national standards of justice.

## **Vision**

The Public Defense Services Commission (PDSC) will maintain a sustainable statewide public defense system that provides quality representation to eligible clients in trial and appellate court proceedings. To that end, the PDSC is a

- guardian of the legal rights and interests of public defense clients and the public's interest in equal justice and due process of law.
- champion for the effective delivery of public defense services and administration of justice, and for funding that ensures the continuing availability of competent and dedicated public defense counsel.
- responsive and cooperative policy maker in the state's justice system.
- responsible steward of taxpayer dollars devoted to public defense.

## **Values**

**Leadership** – PDSC is a responsible leader and partner with other state and local agencies and public defense practitioners in the provision of public defense services and the administration of justice in Oregon.

**Accountability** – PDSC is a results-based organization with employees and managers who hold themselves accountable by establishing performance standards and outcome-based benchmarks and who implement those measures through regular performance evaluations and day-to-day best practices. PDSC and OPDS award and administer public defense services contracts in an open, even-handed and business-like manner ensuring fair and rational treatment of all affected parties and interests. The PDSC is accountable to the Oregon Legislature, the public, and itself.

Cost-Efficiency - PDSC is a responsible steward of taxpayer dollars and consistently seeks to administer public defense services in a way that most effectively provides efficiencies and improved outcomes for public defense clients and within Oregon's public safety and child welfare systems. PDSC's commitment to providing quality public defense services also promotes cost-efficiency by reducing the chances of legal error and the costs associated with remanded proceedings following appeals, post-conviction relief, retrials, and other costly actions.

### **Legislative Advocacy**

The PDSC views its role in appearing before the Oregon Legislative Assembly and committees of the Assembly to be primarily for the purpose of

- advocating for a state budget sufficient to ensure (a) the delivery of quality public defense services, and (b) the continuing availability of competent and dedicated public defense counsel.
- promoting legislative and policy changes that advance efficiencies, fairness, and compliance with Oregon and national standards of justice.
- providing information in response to requests from legislators or legislative staff.
- informing legislators of (a) the fiscal impact on the public defense system of proposed legislation or existing laws relevant to public defense, and (b) any potential constitutional or other problems that might occur as the result of the enactment, implementation, or amendment of legislation.

The PDSC does not intend this policy to affect the ability of OPDS's Appellate Division (AD) or its attorneys to advocate positions before the Legislative Assembly that are designed to protect or promote the legal rights and interests of AD's clients.

### **Standards of Service**

The PDSC embraces the following standards for all OPDS employees:

- deliver directly or contract for professional services in a manner that meets the highest applicable legal and ethical standards;
- conduct all legal, contracting, and business services in a rational and fair manner;
- address all requests for information and inquiries in a timely, professional, and courteous manner;
- implement policies and best practices that serve as models for the cost-efficient delivery of public services and the effective administration of government;
- utilize results-based standards and performance measures that promote quality, cost-efficiency, and accountability;
- ensure the continued success of the OPDS Appellate Division by following practices that support excellence.

## **2016-2021 Goals and Strategies**

**Goal I:** Provide competent, client-centered representation at all stages of a proceeding.

**Challenges Addressed by Achieving this Goal:** By providing quality public defense services, the PDSC fulfils its statutory mandate and serves as a prudent manager of state resources. Quality representation at the trial court level reduces other costs to the public safety system, such as reversals following appeals or post-conviction relief proceedings, wrongful convictions in criminal cases, excessive prison bed use in criminal cases, foster care costs in juvenile dependency cases, and unnecessary commitment of allegedly mentally ill individuals through the civil commitment process.<sup>2</sup> Quality representation is also critical to protecting the statutory and constitutional rights of all Oregonians.

*Strategy 1: Build legislative support for public defense funding and programs that ensure representation in conformance with state and national standards.*

*Strategy 2: Improve monitoring of contractor performance through use of increased reporting requirements, including results of client satisfaction surveys, and through analysis of available data demonstrating contract lawyer case activities, case outcomes, and caseload information.*

*Strategy 3: Increase OPDS presence across the state to provide training, support, and monitoring of contract providers, better coordinate services between trial and appellate practitioners, and improve coordination with system stakeholders at local levels.*

*Strategy 4: Establish and enforce Oregon-specific caseload standards.*

*Strategy 5: Develop juvenile delinquency expertise within OPDS to better support delinquency practitioners around the state.*

*Strategy 6: Work with OCDLA and others to improve diversity and cultural competency within public defense, and public safety and child welfare systems.*

*Strategy 7: Preserve, enhance, and recognize excellence.*

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<sup>2</sup> PFAFFA, JOHN, *Mockery of Justice for the Poor*, The New York Times, April 29, 2016: [http://www.nytimes.com/2016/04/30/opinion/a-mockery-of-justice-for-the-poor.html?smprod=nytcore-ipad&smid=nytcore-ipad-share&\\_r=0](http://www.nytimes.com/2016/04/30/opinion/a-mockery-of-justice-for-the-poor.html?smprod=nytcore-ipad&smid=nytcore-ipad-share&_r=0)



**Goal II:** Maintain a sustainable, accountable, and integrated statewide public defense system.

**Challenges Addressed by Achieving this Goal:** The PDSC faces many challenges in its effort to provide quality public defense services, but creating a sustainable system remains one of the biggest. Low contract rates and correspondingly low rates of pay, high caseloads, court dockets that have multiple cases set at the same time, limitations on contacting in-custody clients, and lack of modernized computer systems create significant inefficiencies within Oregon’s public defense system. Providers struggle to attract and retain qualified lawyers due to comparatively low pay and increasing law student debt.<sup>3</sup> Low rates of pay also make it difficult for providers to maintain manageable workloads that permit attorneys to discharge their ethical and constitutional obligations to clients.<sup>4</sup> Especially in urban areas, new graduates take positions with public defense providers but leave once they have gained some experience in order to avoid low pay and high caseloads. Providers are in a constant cycle of hiring and training, without sufficient internal resources for mentoring. In rural areas, providers struggle to attract new lawyers, and experienced lawyers are retiring or relocating. These challenges are exacerbated by daily struggles with crowded court dockets and courthouses without dedicated space for public defense providers where failure to connect with a client can yield higher failure to appear rates and unnecessary delays. Lack of space for public defense lawyers also compromises confidential communications, and hampers lawyers’ efforts to be productive between court proceedings.

*Strategy 1: Adopt competitive pay structures, clear contract provisions, standardized reporting requirements, and regular audit procedures that incentivize quality practices and prevent excessive caseloads.*

*Strategy 2: Advocate for dedicated public defender space in Oregon courthouses to increase regular client contact, protect confidential communications, and encourage efficient use of lawyers’ time between court proceedings.*

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<sup>3</sup> “A legal education can cost upwards of \$150,000, and students, on average, graduate from law school with \$93,359 in debt...” Hopkins, Katy, *10 Law Degrees With Most Financial Value at Graduation*, U.S. News & World Report, March 29, 2011.

<sup>4</sup> “In 2012, the average law graduate’s debt was \$140,000, 59 percent higher than eight years earlier.” New York Times Editorial Board, *The Law School Debt Crisis*, October 24, 2015

*Strategy 3: Actively participate in the development of public policy at state and local levels by providing accurate and reliable information about Oregon's public safety and child welfare systems.*

*Strategy 4: Adopt attorney qualifications requirements that reflect the knowledge, skills, and abilities necessary to do the work.*

*Strategy 5: Support increased access to social work experts, who can efficiently address client needs, so that lawyers can focus on legal work.*

*Strategy 6: Secure adequate, qualified staffing, and modernized data systems to support OPDS programs and services.*

*Strategy 7: Maintain fiscal integrity and develop a long-term financial stability plan for PDSC programs.*

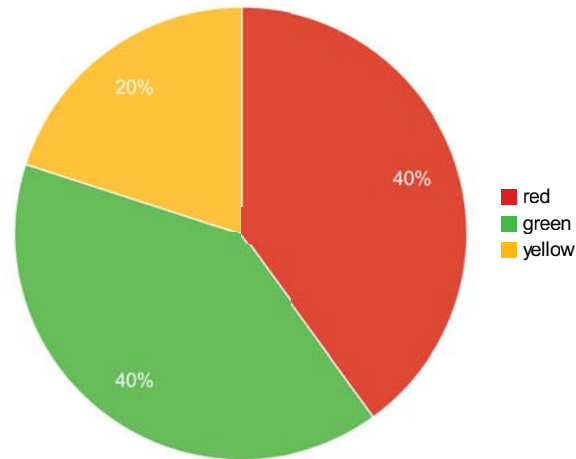
# **Public Defense Services Commission**

Annual Performance Progress Report

Reporting Year 2016

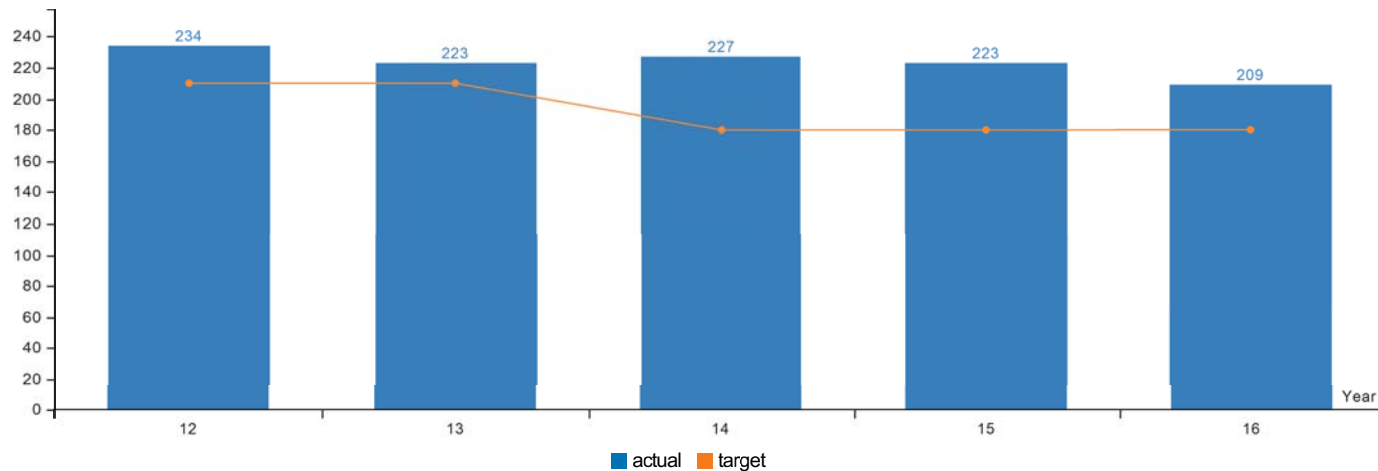
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KPM #	Approved Key Performance Measures (KPMs)
1	APPELLATE CASE PROCESSING - Median number of days to file opening brief.
2	CUSTOMER SERVICE - Percent of customers rating their satisfaction with the agency's customer service as "good" or "excellent": overall customer service, timeliness, accuracy, helpfulness, expertise and availability of information.
3	BEST PRACTICES FOR BOARDS AND COMMISSIONS - Percentage of total best practices met by Commission.
4	TRIAL LEVEL REPRESENTATION - During the term of the OPDS contract, percent of attorneys who obtain at least 12 hours per year of continuing legal education credit in the area(s) of law in which they provide public defense representation.[1] [1] Case types listed in the 2014-2015 Public Defense Legal Services Contract General Terms are: criminal cases, probation violations, contempt cases, civil commitment cases, juvenile cases, and other civil cases. ( <a href="http://www.oregon.gov/OPDS/docs/CBS/ModelContractTerms/documents/ModKJan2014.pdf">http://www.oregon.gov/OPDS/docs/CBS/ModelContractTerms/documents/ModKJan2014.pdf</a> )
5	PARENT CHILD REPRESENTATION PROGRAM (PCRP) - Percent of PCRP attorneys who report spending approximately 1/3 of their time meeting with court appointed clients in cases which the attorney represents a parent or child with decision-making capacity.[1] [1] For a discussion on determining decision-making capacity, see The Obligations of the Lawyer for Children in Child Protection Proceedings with Action Items and Commentary, Oregon State Bar, Report of the Task Force on Standards of Representation in Juvenile Dependency Cases (2014).



	Green	Yellow	Red
	= Target to -5%	= Target -6% to -15%	= Target > -15%
Summary Stats:	40%	20%	40%

KPM #1	APPELLATE CASE PROCESSING - Median number of days to file opening brief.
	Data Collection Period: Jan 01 - Dec 31



Report Year	2012	2013	2014	2015	2016
<b>Median Number of Days to File Opening Brief</b>					
Actual	234	223	227	223	209
Target	210	210	180	180	180

### How Are We Doing

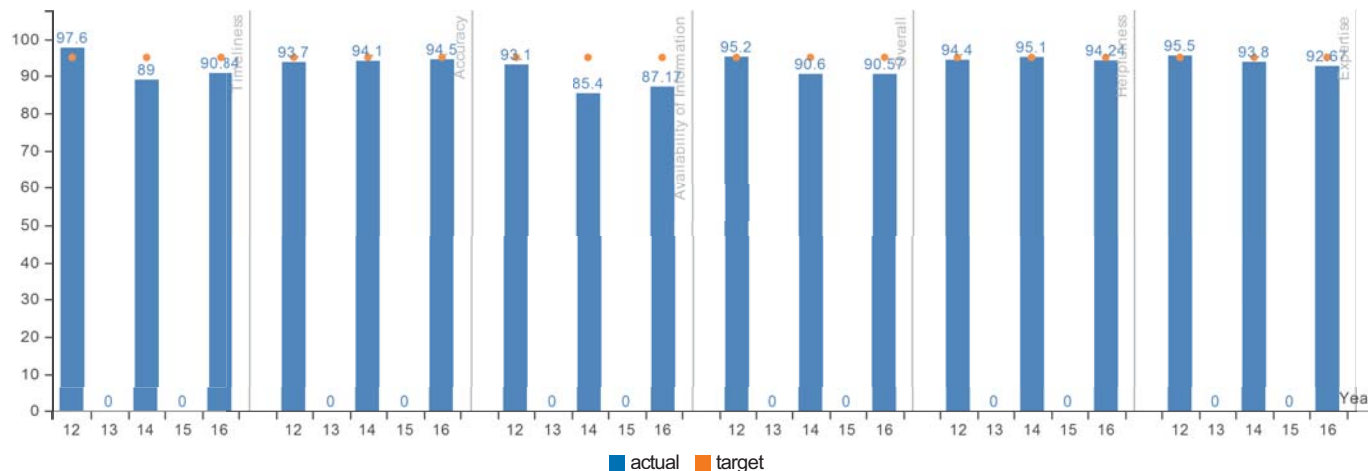
The Appellate Division has made significant progress over the past ten years and is on track for further improvements. In 2006, the median number of days to file the opening brief was 328; by 2009 that number was reduced to 236 days. During the next six years, the number fluctuated between a low of 223 (2013, 2015) and a high of 234 (2011, 2012). For fiscal year 2016, the median date fell to 209 days. The fluctuations and latest progress is primarily attributable to two causes. First, appellate practice is a specialty area. It generally takes about three to five years to develop into a proficient attorney able to manage confidently and efficiently a caseload of moderately complex appeals. Since 2010, the Criminal Section lost 11 attorneys with, on average, more than 10 years of experience. Currently, 13 of the 34 non-managing attorneys in the Criminal Section (more than one-third) have less than 5 years of appellate experience. Second, in 2012 the Criminal Section ceased contracting to outside attorneys caseload “overflow” (non-conflict cases that the Criminal Section could not retain while maintaining progress made into the backlog), which had grown to more than 200 cases per year. Assuming adequate resources, the continued development of attorneys with less than 5 years of appellate experience, and the retention of attorneys with 5 or more years of experience, the agency anticipates making significant strides toward its 180-day goal.

### Factors Affecting Results

The ability to meet and exceed the goal correlates positively to the number of experienced attorneys and negatively to the number of cases. The agency does not control the number of referred cases. Attracting, training, and retaining competent attorneys affect progress toward the goal.

KPM #2 CUSTOMER SERVICE - Percent of customers rating their satisfaction with the agency's customer service as "good" or "excellent": overall customer service, timeliness, accuracy, helpfulness, expertise and availability of information.

Data Collection Period: Jan 01 - Dec 31



Report Year	2012	2013	2014	2015	2016
<b>Timeliness</b>					
Actual	97.60%	No Data	89%	No Data	90.84%
Target	95%	TBD	95%	TBD	95%
<b>Accuracy</b>					
Actual	93.70%	No Data	94.10%	No Data	94.50%
Target	95%	TBD	95%	TBD	95%
<b>Availability of Information</b>					
Actual	93.10%	No Data	85.40%	No Data	87.17%
Target	95%	TBD	95%	TBD	95%
<b>Overall</b>					
Actual	95.20%	No Data	90.60%	No Data	90.57%
Target	95%	TBD	95%	TBD	95%
<b>Helpfulness</b>					
Actual	94.40%	No Data	95.10%	No Data	94.24%
Target	95%	TBD	95%	TBD	95%
<b>Expertise</b>					
Actual	95.50%	No Data	93.80%	No Data	92.67%
Target	95%	TBD	95%	TBD	95%



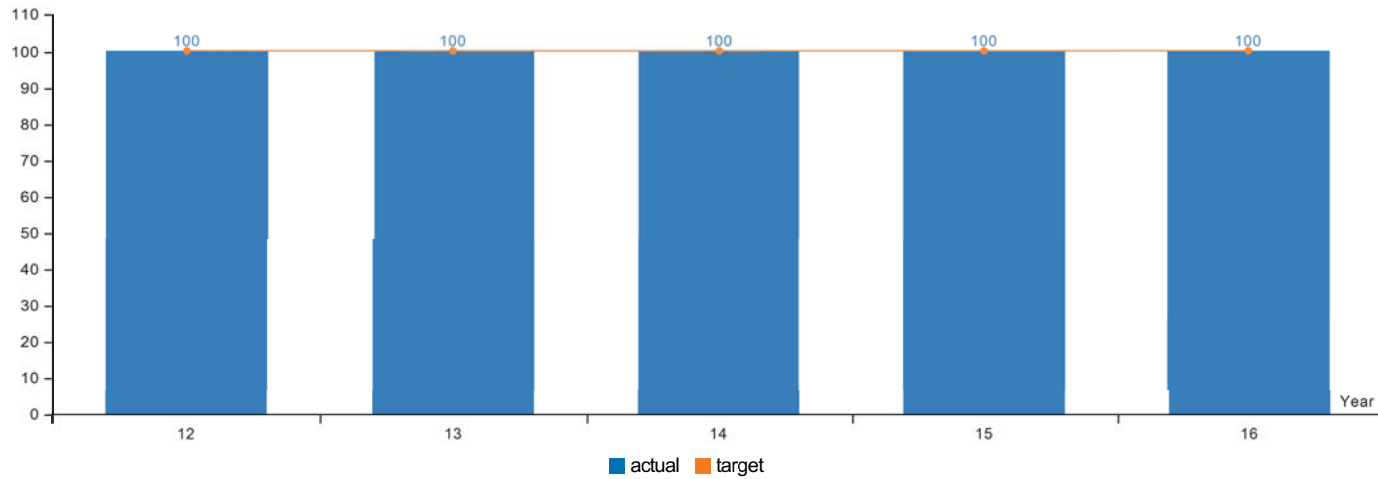
## **How Are We Doing**

The most recent survey was conducted in June 2016. The survey results indicated a high level of customer satisfaction with the agency. The overall service provided by OPDS was rated as good or excellent by more than 90% of the respondents. The standard reporting measure for state agencies groups both "good" and "excellent" into one category. In the categories of helpfulness of OPDS employees, over 94% of respondents rated the agency's service as "good" or "excellent". The lowest rating was in the category of availability of information, where 87% of the respondents rated the agency's service as "good" or "excellent".

## **Factors Affecting Results**

The ratings in three categories were somewhat higher in 2016 than the most recent survey in 2014. The agency believes the ratings would have been higher in all categories but for the considerable turnover of longtime staff in the Accounts Payable Section. Between 2013 and 2015, the agency lost more than half of its staff to retirements and resignations. This change naturally required considerable training and mentoring of five new staff members which resulted in some processing delays. The change also meant that phone calls and other requests for information that had been routed through employees with years of experience were now being handled by new employees with less experience and authority to respond. The agency believes this resulted in providers feeling that their questions were not always being fully answered and information being less available to them.

KPM #3	BEST PRACTICES FOR BOARDS AND COMMISSIONS - Percentage of total best practices met by Commission.
	Data Collection Period: Jan 01 - Dec 31



Report Year	2012	2013	2014	2015	2016
<b>Percentage of total best practices met</b>					
Actual	100%	100%	100%	100%	100%
Target	100%	100%	100%	100%	100%

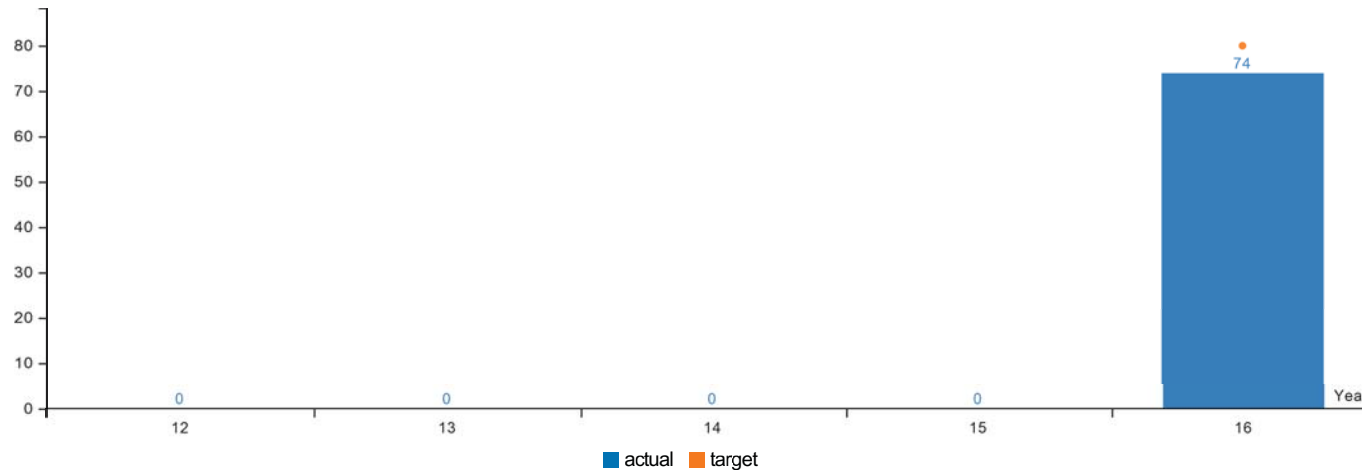
**How Are We Doing**

At the Commission's July 25, 2016 meeting, commission members reviewed the self-assessment in detail and confirmed that the agency met all of the best practices for boards and commissions.

**Factors Affecting Results**

There are no factors that would prohibit the agency from meeting all of the best practices.

KPM #4	TRIAL LEVEL REPRESENTATION - During the term of the OPDS contract, percent of attorneys who obtain at least 12 hours per year of continuing legal education credit in the area(s) of law in which they provide public defense representation.[1] [1] Case types listed in the 2014-2015 Public Defense Legal Services Contract General Terms are: criminal cases, probation violations, contempt cases, civil commitment cases, juvenile cases, and other civil cases. ( <a href="http://www.oregon.gov/OPDS/docs/CBS/ModelContractTerms/documents/ModKJan2014.pdf">http://www.oregon.gov/OPDS/docs/CBS/ModelContractTerms/documents/ModKJan2014.pdf</a> )
	Data Collection Period: Jan 01 - Dec 31



Report Year	2012	2013	2014	2015	2016
<b>Percent of Attorneys with 12 CLE Credits Annually</b>					
Actual	No Data	No Data	No Data	No Data	74%
Target	TBD	TBD	TBD	TBD	80%

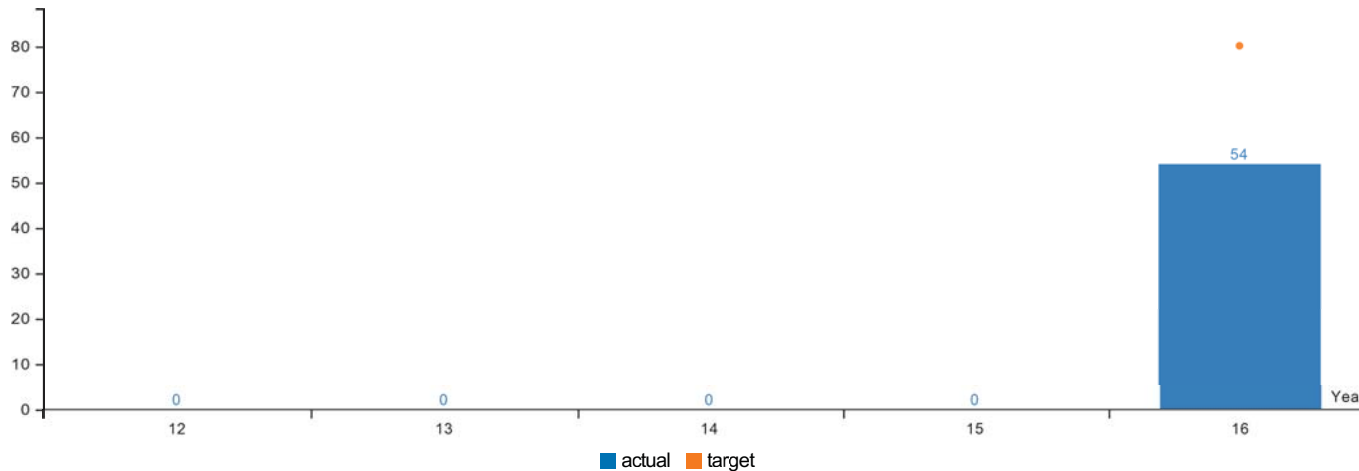
#### How Are We Doing

The survey was sent to 630 attorneys, with an 86% response rate. Of the 541 respondents, 74% report obtaining at least 12 CLE credits annually.

#### Factors Affecting Results

This was the first time this agency requested all public defense lawyers across the state to report CLE information. Because attorneys are accustomed to reporting to the Oregon State Bar every three years, this request was outside of their normal reporting period, and required them to take additional steps to report CLE activities. Additionally, the contract provision requiring lawyers to earn at least 12 CLE hours each year in their areas of public defense practice didn't go into effect until January 2016. This survey was structured to collect information from 2015, when there may have been less incentive to obtain credits.

KPM #5	PARENT CHILD REPRESENTATION PROGRAM (PCRPP) - Percent of PCRPP attorneys who report spending approximately 1/3 of their time meeting with court appointed clients in cases which the attorney represents a parent or child with decision-making capacity.[1] [1] For a discussion on determining decision-making capacity, see The Obligations of the Lawyer for Children in Child Protection Proceedings with Action Items and Commentary, Oregon State Bar, Report of the Task Force on Standards of Representation in Juvenile Dependency Cases (2014).
	Data Collection Period: Jan 01 - Dec 31



Report Year	2012	2013	2014	2015	2016
<b>Percent of PCRPP Attorneys Spending 1/3 Time Meeting With Clients</b>					
Actual	No Data	No Data	No Data	No Data	54%
Target	TBD	TBD	TBD	TBD	80%

#### How Are We Doing

This Key Performance Measure separates representation of clients with decision-making capacity from representation of clients with diminished capacity (typically young children). However, data gathered by the PCRPP program does not distinguish based on decision-making capacity. Therefore, the data reported for this KPM includes time spent with all clients.

From July 2015-June 2016, an average of 54% of the PCRPP attorneys report spending approximately one-third of their time meeting with clients. During this time period, the 21 PCRPP attorneys spent an average of 27% of their time meeting with clients.

#### Factors Affecting Results

The PCRPP was launched in August 2014 in Linn and Yamhill counties and in Columbia County in January 2016. Initial results of the program are promising: the 2014-2015 PCRPP Annual Report identifies three themes arising from PCRPP data.[1] First, the quality of legal representation has improved as a result of practice changes. Second, families are preserved through the use of reunification and guardianship and third, the use of foster care has declined.

[1] Annual Report 2014-2015, Parent Child Representation Program. [http://www.oregon.gov/OPDS/docs/Reports/PCRPP\\_report\\_PDSC\\_Jan\\_2016.pdf](http://www.oregon.gov/OPDS/docs/Reports/PCRPP_report_PDSC_Jan_2016.pdf)

The Parent Child Representation Program includes case managers, social service professionals who are part of the legal representation team, in 12% of cases. The use of case managers who

work with attorneys to address non-legal barriers to sensible case resolution is a best practice and a critical component of the success of the PCRCP. The PCRCP case managers are required to spend at least 85% of their time in direct service work. If the time case managers spend in direct service is added to the time attorneys spend with clients, an average of 48% of the time invested by the defense team from July 2015-June 2016 is spent with clients or in direct client service.

Other factors include the complexity of the case, the age and capacity of the client, and the direction of the client with respect to case objectives.

The agency needs to continue to monitor the quality of work provided by lawyers in the Parent Child Representation Program. Because the program is in its infancy, additional consideration should be given to which metrics are most sensible to measure and which are indicative of quality effective legal representation.

<h1>ACF</h1> <p>Administration for Children and Families</p>	U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES  Administration on Children, Youth and Families	
	<b>1. Log No:</b> ACYF-CB-IM-17-02	<b>2. Issuance Date:</b> January 17, 2017
	<b>3. Originating Office:</b> Children's Bureau	
	<b>4. Key Words:</b> Legal Representation and Child Welfare; Parent Attorney, Children's Attorney, Agency Attorney, Quality Legal Representation	

**TO:** State, Tribal and Territorial Agencies Administering or Supervising the Administration of Title IV-E and IV-B of the Social Security Act, Indian Tribes and Indian Tribal Organizations, State Courts, and State and Tribal Court Improvement Programs.

**SUBJECT:** High Quality Legal Representation for All Parties in Child Welfare Proceedings

**PURPOSE:** To encourage all child welfare agencies, courts, administrative offices of the courts, and Court Improvement Programs to work together to ensure parents, children and youth, and child welfare agencies, receive high quality legal representation at all stages of child welfare proceedings.

**LEGAL AND RELATED REFERENCES:** Title IV-E and IV-B of the Social Security Act; the Child Abuse Prevention and Treatment Act (CAPTA) (42 U.S.C. 5106a et seq.); the Indian Child Welfare Act of 1978 (ICWA) (Pub. L. 95-608)

**INFORMATION**

The purpose of this information memorandum is to emphasize the importance of high quality legal representation in helping ensure a well-functioning child welfare system. This memorandum also highlights important research and identifies best practices and strategies to promote and sustain high quality legal representation for all parents, children and youth, and child welfare agencies in all stages of child welfare proceedings.

The Children's Bureau (CB) strongly encourages all child welfare agencies and jurisdictions (including, state and county courts, administrative offices of the court, and Court Improvement Programs) to work together to ensure that high quality legal representation is provided to all parties in all stages of child welfare proceedings.

**I. Background**

Courts play an integral role in the child welfare system. A court order is required to involuntarily remove a child or youth from the home and to find that child or youth dependent.



Once a child is removed from home and placed in out-of-home care, federal law requires that judges make a number of determinations about the safety of the home of removal, the welfare of the child, and that child's permanency plan in order for an agency to receive title IV-E funding.<sup>1</sup>

A court must review agency decisions about the family, the suitability of the child or youth's temporary placement, and the child's permanency plan that will result in family preservation, reunification, or another permanency goal. In order for a judge to make the best possible decisions for a family, it is critical that he or she receive the most accurate and complete information possible from and about all parties. Incomplete or inaccurate information renders judicial decision-making more difficult and may result in delays, increases in the length of time children and youth spend in care, additional costs to state or tribal government, and less beneficial decisions.

Numerous studies and reports point to the importance of competent legal representation for parents, children, and youth in ensuring that salient information is conveyed to the court, parties' legal rights are protected and that the wishes of parties are effectively voiced. There is evidence to support that legal representation for children, parents and youth contributes to or is associated with:

- increases in party perceptions of fairness;
- increases in party engagement in case planning, services and court hearings;
- more personally tailored and specific case plans and services;
- increases in visitation and parenting time;
- expedited permanency; and
- cost savings to state government due to reductions of time children and youth spend in care.

The decisions courts make in child welfare proceedings are serious and life changing. Parents stand the possibility of permanently losing custody and contact with their children. Children and youth are subject to court decisions that may forever change their family composition, as well as connections to culture and heritage. Despite the gravity of these cases and the rights and liabilities at stake, parents, children and youth do not always have legal representation. Child welfare agencies also sometimes lack adequate legal representation. In some states parents or children may not be appointed counsel until a petition to terminate parental rights has been filed. The absence of legal representation for any party at any stage of child welfare proceedings is a significant impediment to a well-functioning child welfare system.

## **II. Parties, Interests and Rights**

The U.S. legal system is based on the premise that parties have a due process right to be heard and that competent legal representation and fair treatment produce just results. Parents, children and youth, and title IV-E/IV-B agencies are all parties to child welfare proceedings. Each may be required to provide sworn testimony under oath in court, each may be cross-examined and all are subject to court orders. All parties have significant liberties or liabilities at stake.

### *Parents*

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<sup>1</sup> 42 U.S.C. 672(a)(2)(A)(ii); 42 U.S.C. 671(a)(15); 45 CFR § 1356.21(b)(2).

The stakes are particularly high for parents in child welfare proceedings as their parental rights may be permanently severed, a right that the United States Supreme Court has identified as a fundamental liberty interest.<sup>2</sup> By any standard this marks a significant deprivation. Termination of parental rights is often referred to as the civil law equivalent of the death penalty.

There is consensus in the field that the rights at stake for parents and the complexity of legal proceedings in child welfare cases require all parents to have competent legal counsel. Parents' attorneys protect parents' rights and can be key problem solvers as counselors at law, helping parents understand their options, the best strategies for maintaining or regaining custody of their children and bringing cases to conclusion.

### *Children and Youth*

Children and youth that have been removed from their families, even for a short period of time, experience a range of trauma and stress. Children and youth are often scared and confused and have incomplete understandings of what is happening to their families and what their future will hold. A recent study characterizes this uncertainty as “ambiguity” and provides evidence that ambiguity (this not knowing where he or she will live or what will happen to him or her) is a tremendous source of trauma.<sup>3</sup>

Federal law recognizes the importance of children having an advocate in judicial proceedings. In order to receive funding under the Child Abuse Prevention and Treatment Act (CAPTA) state grant, the governor of each state must provide an assurance that the state has provisions and procedures requiring “that in every case involving a victim of child abuse or neglect which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, including training in early childhood, child, and adolescent development, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings—(I) to obtain first-hand, a clear understanding of the situation and needs of the child; and (II) to make recommendations to the court concerning the best interests of the child.”<sup>4</sup>

While CAPTA allows for the appointment of an attorney and/or a court appointed special advocate (CASA), there is widespread agreement in the field that children require legal representation in child welfare proceedings.<sup>5</sup> This view is rooted in the reality that judicial proceedings are complex and that all parties, especially children, need an attorney to protect and advance their interests in court, provide legal counsel and help children understand the process

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<sup>2</sup> *Santosky v. Kramer*, 455 U.S. 745 (1982).

<sup>3</sup> See Mitchell, Monique. (2016) *The Neglected Transition: Building a Relational Home for Children Entering Foster Care*. Oxford: Oxford University Press.

<sup>4</sup> 42 U.S.C. 5106a (b)(2)(B)(xiii).

<sup>5</sup> One of the findings of the Quality Improvement Center on the Representation of Children in the Child Welfare System (QIC-ChildRep), a project funded by CB, is that there is widespread agreement on the proper role of the child's attorney. The QIC-ChildRep review of the academic literature, national standards, conference recommendations and stakeholder opinion documents the evolution of lawyer representation of children and reveals an emerging consensus on nearly all aspects of the role and duties of the child's legal representative. Even the differences across the debate of client-directed versus best interests are narrowed. The QIC-ChildRep recommends that states adopt the 2011 ABA Model Act as the statutory structure for legal representation of the child. See Appendix A for descriptions of an exemplary specialty office and a statewide model of delivering child representation.

and feel empowered. The confidential attorney-client privilege allows children to feel safe sharing information with attorneys that otherwise may go unvoiced.

In addition to attorneys, children and youth also benefit from a lay guardian ad litem, such as a CASA. CASAs can make important contributions to child welfare proceedings through time spent getting to know the child's needs and reports to the court.

### *Child Welfare Agencies*

Title IV-E/IV-B caseworkers and their supervisors must regularly appear in court. It is incumbent upon these caseworkers and supervisors to provide evidence that the agency has made reasonable efforts (or active efforts where cases are subject to Indian Child Welfare Act<sup>6</sup> (ICWA)) to prevent removals,<sup>7</sup> that it is contrary to the welfare of a child to remain in the home,<sup>8</sup> and that reasonable efforts have been made to finalize a permanency plan.<sup>9</sup>

Attorneys for public child welfare agencies play a crucial role in ensuring that the child welfare agency presents evidence of its diligence in working with families, that reasonable efforts are made, and that there are not undue delays in service provision, case planning or other vital services to keep families safe, together and strong. Agency attorneys can provide valuable oversight as to whether removal or return decisions conform to the proper standards. Such oversight is critical to ensuring judges have the information requisite to make statutorily required judicial determinations. Agency representation has also been identified as a safeguard against case workers engaging in the unauthorized practice of law.

### *State and Territorial Governments*

Concern over the rights of children in care has resulted in federal class action lawsuits alleging civil rights violations. Such lawsuits cost state governments hundreds of millions of dollars in legal defense expenses. It stands to reason that high quality legal representation for all parties may help ensure greater system accountability, thereby reducing the likelihood that such lawsuits are filed in the first place.

### *Tribes and Tribal Governments*

In cases involving an Indian child, it is critical that the right of tribes to intervene and participate in proceedings under ICWA is honored and that an attorney or other representative of the tribe be noticed, present if the tribe deems it appropriate, or otherwise able to fully represent the tribe of which the child is a member or eligible for membership.<sup>10</sup> As sovereign nations, tribes have a statutorily protected interest<sup>11</sup> in member or potential member children who are party to state child welfare proceedings, and it is critical that the tribal voice be heard.

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<sup>6</sup> 25 U.S.C. 1912(d).

<sup>7</sup> 42 U.S.C. 672(a)(2)(A)(ii).

<sup>8</sup> *Id.*

<sup>9</sup> 42 U.S.C. 671(a)(15); 45 CFR § 1356.21(b)(2).

<sup>10</sup> 81 FR 3886/ 25 CFR part 23; see also, the BIA's 2016 ICWA Guidelines (p.8, A.3, re: 23.133). Note that tribes, as sovereign nations, should identify their own representatives in state court proceedings, whether or not the representative is a lawyer. <https://www.bia.gov/cs/groups/public/documents/text/idc2-056831.pdf>

<sup>11</sup> 25 U.S.C. 1901(3).

Failure to provide a meaningful opportunity for tribes to participate in cases involving Indian children is a violation of ICWA<sup>12</sup>, may lead to unnecessary long stays in care, increased foster care costs, appeals, and unnecessary trauma for Indian children and youth.

### **III. Increases in Procedural Justice, Fairness and Engagement**

State intervention in the lives of families, even when absolutely necessary, is a traumatic experience for children and parents alike. Removal and family separation based on allegations of abuse or neglect typically represent the most difficult and vulnerable time a family may face. During this time, it may be very difficult for a parent to fully trust an agency caseworker. A parent also may not fully understand how the child welfare system works, the relevant laws and his or her legal rights.

Lack of trust and lack of familiarity with the child welfare system can create significant barriers to engagement, especially for youth and parents. Lack of engagement can stand in the way of identifying strengths, needs and resources and impede all elements of case planning. When a parent or youth is unable or unwilling to engage with child protective services or agency caseworkers it is less likely that they will feel the process is fair.

Research supports that when a party experiences a sense of fairness, he or she will be more likely to comply with court orders, return for further hearings, trust the system, and will be less likely to repeat offenses.<sup>13</sup> In the legal field, this feeling of fairness or trust in court proceedings is known as procedural justice.

Researchers have identified four key components to procedural justice: 1) voice – having one’s viewpoint heard; 2) neutrality – unbiased decision-makers and transparency of process; 3) respectful treatment – individuals are treated with dignity; 4) trustworthy authorities – the view that the authority is benevolent, caring, and genuinely trying to help.<sup>14</sup>

Several studies and program evaluations examining legal representation in child welfare proceedings have identified competent legal representation as a key element in enhancing party perceptions of procedural justice. A small [study](#) in Mississippi compared the outcomes of child abuse and neglect cases for parents who did and did not have legal representation in two Mississippi counties.<sup>15</sup> Parents who were represented by an attorney believed that they had a greater voice in determining case outcomes, and they understood the court process better than parents without attorneys. In addition, preliminary findings indicate a trend toward more positive

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<sup>12</sup> 25 CFR 23.111.

<sup>13</sup> See generally Leben, S. & Burke, K. (2007-2008) Procedural fairness: A key ingredient in public satisfaction. *Court Review*, 44, 4-17; Tyler, T. & Zimerman, N. (2010) Between Access to Counsel and Access to Justice: A Psychological Perspective. *Fordham Urban Law Journal*, 37, 473-507; Tyler, T. (2007-2008) Procedural justice and the courts. *Court Review*, 44, 26-31 Tyler, T. (1990). *Why People Obey the Law: Procedural Justice, Legitimacy, and Compliance*. New Haven: Yale University Press.

<sup>14</sup> Tyler, T. & Zimerman, N. (2010) Between Access to Counsel and Access to Justice: A Psychological Perspective. *Fordham Urban Law Journal*, 37, 473-507.

<sup>15</sup> Exploring Outcomes Related to Legal Representation for Parents Involved in Mississippi’s Juvenile Dependency System, Preliminary Findings, National Council of Juvenile and Family Court Judges (2013) available at: <https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=266785>

outcomes in cases where parents were represented by an attorney: they attended court more often, stipulated to fewer allegations, and had their children placed in foster care less often.

The importance of procedural justice has also been recognized by the Conference of Chief Justices and the Conference of State Court Administrators. In 2013, the Conferences jointly adopted a resolution to support and encourage state supreme court leadership to promote procedural fairness, identifying procedural justice as critical for courts to promote citizen's experience of a fair process.<sup>16</sup>

#### **IV. Early Appointment of Counsel, Improved Case Planning, Expedited Permanency and Cost Savings**

There is a growing body of empirical research linking early appointment of counsel (at or prior to a party's initial appearance in court) and effective legal representation in child welfare proceedings to improved case planning, expedited permanency and cost savings to state government.<sup>17</sup> Early appointment of counsel allows attorneys for parents and children to be involved from the very beginning of a case. Attorneys can contest removals, identify fit and willing relatives to serve as respite care providers, advocate for safety plans and identify resources, all of which may help prevent unnecessary removal and placement. Where removal is necessary attorneys for parents and children can be actively involved in case planning, helping to craft solutions that address their client's needs and concerns and expediting reunification or other permanency goals.

The [Quality Improvement Center on the Representation of Children in the Child Welfare System](#) (hereinafter, QIC-ChildRep), a randomized control trial funded by the CB, provided strong evidence that the early appointment of a well-trained attorney for children and youth expedites permanency.<sup>18</sup> Children represented by attorneys trained and practicing under the QIC-ChildRep model in Washington State were 40 percent more likely to experience permanency within the first six months of placement than children represented by non QIC-ChildRep attorneys.<sup>19</sup>

A number of smaller, less rigorous studies lend further support to links between early legal representation and expedited permanency. A pilot study in Texas aimed at earlier appointment of attorneys for parents found that cases where attorneys were appointed within ten days of petition filing had more permanent outcomes (e.g., reunification) than cases in which attorneys were appointed later.<sup>20</sup> A study examining foster care data from multiple jurisdictions found that the

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<sup>16</sup> Conference of Chief Justices and Conference of State Court Administrators (2013) Resolution 12: In Support of State Supreme Court Leadership to Promote Procedural Fairness. (<http://ccj.ncsc.org/~media/microsites/files/ccj/resolutions/07312013-support-state-supreme-court-leadership-promote-procedural-fairness-ccj-cosca.ashx>).

<sup>17</sup> See Thornton & Gwin (Spring 2012) *High-Quality Legal Representation for Parents in Child Welfare Cases Results in Improved Outcomes for Families and Potential Cost Savings*, 46 Fam Law Quarterly 139.

<sup>18</sup> See Duquette *et. al.*, (2016) *Children's Justice: How to Improve Legal Representation of Children in the Child Welfare System*, ABA Publications; *see also* QIC findings: Robbin Pott (2016), *The Flint MDT Study*, in CHILDREN'S JUSTICE.

<sup>19</sup> Olebeke, Zhou, Skles & Zinn, (2016) Evaluation of the QIC-ChildRep Best Practices Model Training for Attorneys Representing Children in the Child Welfare System, Chapin Hall. Available at: <http://www.chapinhall.org/qicreport>

<sup>20</sup> Wood, S. M., Summers, A., & Duarte, C.S. (2016). Legal Representation in the Juvenile Dependency System: Travis County, Texas' Parent Representation Pilot Project. *Family Court Review*, 54, 277-287.

presence of the mother's attorney at the preliminary protective hearing (emergency removal hearing) predicted a higher likelihood of reunification.<sup>21</sup>

There is also evidence that legal representation helps ensure more thoughtful and effective case planning. A study conducted in Palm Beach Florida found that children's attorneys practicing in compliance with the practice model resulted in more personally tailored and specific case plans and services, as well as expedited permanency.<sup>22</sup>

Both parents' attorneys and children's attorneys can be helpful in addressing collateral legal issues that may leave families vulnerable, such as housing, employment, immigration, domestic violence, healthcare and public benefits issues -- one or any combination of which may contribute to bringing families into contact with the child welfare system. Such efforts may help prevent children from entering foster care or help children return home sooner.

High quality agency representation brings a number of clear benefits to a jurisdiction's child welfare system. Consistent statewide quality legal representation helps individual caseworker practice and overall statewide performance. More consistent advice and consultation with counsel helps ensure child welfare agencies policies and procedures are followed consistently across the state and that all federal child welfare requirements are met. Agency effort has a direct result on judicial decisions, which in turn directly affects federal monitoring and continuous quality improvement efforts such as the title IV-E foster care eligibility reviews and Child and Family Services Reviews (CFSR).

Agency representation provides legal guidance to child welfare agencies that helps caseworkers meet legal standards governing caseworker visits, evidentiary burdens, compliance with court orders, and existing law. Consistent and adequate representation is likely to reduce the number of court hearings required and make court hearings more focused and efficient. Consistent agency representation also helps child welfare agencies avoid over-intervention while still protecting those children at risk.

The most rigorous research effort examining agency representation to date found that agency attorneys who represented the agency as a client (the agency representation model) and received specialized training achieved permanent placement decisions for children on average 250 days more quickly than attorneys external to the agency (also known as the prosecutorial model) representing the state<sup>23</sup>. Data also indicated significant state savings because of the reduction in time children spent in temporary foster care placements.

## **V. Standards of Practice, Specialization, and Quality Assurance**

Leading national organizations have long emphasized that the gravity of the interests at stake in child welfare cases require well-trained legal representation for all parties at all stages of child

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<sup>21</sup> Wood., S.M., & Russell, J.R. (2011). Effects of parental and attorney involvement on reunification in juvenile dependency cases. *Children and Youth Services Review*, 33, 730-1741.

<sup>22</sup> See Zinn, A. & Slowriver, J. (2008), *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County*. Chapin Hall Center for Children at the University of Chicago *available at* <https://www.chapinhall.org/research/report/expediting-permanency>

<sup>23</sup> See Herring, D. (1993). Legal Representation for the State Child Welfare Agency in Civil child Protection Proceedings: A Comparative Study. *Tol L. Rev.* 603



welfare proceedings. Most notably, the ABA has passed [national standards](#) of practice for parent attorneys, attorneys for children and youth, and counsel for public child welfare agencies in child welfare proceedings.<sup>24</sup> The standards have been widely supported, adopted by many state bar associations and written into court rules and legislation across the country. Under the standards, attorneys practicing child welfare law are required to have a minimum number of child welfare law training hours and provide practice guidance to ensure attorneys represent their clients ethically. CB strongly encourages all states to adopt standards of practice for parents, children and youth, and the child welfare agency to help ensure all parties receive high quality legal representation.

CB has invested in the ABA accredited [Child Welfare Legal Specialist \(CWLS\) Certification](#) program administered by the National Association of Counsel for Children (NACC), which has resulted in over 600 attorneys and judges around the country obtaining CWLS certification.<sup>25</sup> Certification requires attorneys to complete a self-directed course of study, submit work product, and take a test to demonstrate knowledge of applicable child welfare law and practice. CB strongly encourages all attorneys and judges practicing child welfare law to obtain CWLS certification. CB also strongly encourages all Court Improvement Programs, courts, and bar associations to work together to support attorneys and judges that practice child welfare law to obtain CWLS certification.

The QIC-ChildRep provided empirical evidence that specialized child welfare law training and coaching can positively impact attorney behavior and result in more effective representation of children. QIC-ChildRep lawyers changed their behavior to conform to the practice model, resulting in greater contact with clients, increased communications with other important collateral contacts and were more actively involved in conflict resolution and negotiation activities.

Related research has determined that training can impact judges' behavior on the bench. This may hold true for attorney practice as well. A recent [study](#) completed by the National Council of Juvenile and Family Court Judges (NCJFCJ) lends further support to the importance of training legal professionals.<sup>26</sup> The study, which looked at the effect that judicial participation in NCJFCJ's Child Abuse and Neglect Institute had on judicial practice in court hearing revealed that, post-training, judges were more likely to use specific strategies to engage parents in the court process. Judges also asked more questions after the training and were more likely to discuss child well-being and services that would allow the child to return home. This indicates the training was effective in increasing engagement of parents in the process and improving the overall quality of dependency hearings.

## **VI. Caseload, Ethics, and Quality Legal Representation**

The larger the caseload, the less a lawyer can do for any individual client. The NACC recommends a standard of 100 active clients for a full-time attorney.<sup>27</sup> The NACC based this

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<sup>24</sup>Available at: [http://www.americanbar.org/groups/child\\_law/tools\\_to\\_use.html](http://www.americanbar.org/groups/child_law/tools_to_use.html)

<sup>25</sup> Available at: <http://www.naccchildlaw.org/?page=certification>

<sup>26</sup> Child Abuse and Neglect Institute Evaluation: Training Impact on Hearing Practice (2016) available at: <http://www.ncjfcj.org/CANI-Report-2016>

<sup>27</sup> National Association of Counsel for Children, *Child Welfare Law Guidebook*, 2006, at 54.

recommendation on a rough calculation that the average attorney has 2000 hours available per year and that the average child client would require about 20 hours of attention in the course of a year.<sup>28</sup> In the federal class action lawsuit filed against the state of Georgia, *Kenny A. v. Deal*, one of the allegations was that overly large caseloads for children's attorneys violated children's constitutional rights to competent legal counsel. The court heard expert testimony from NACC regarding caseload size. Evidence gained through the testimony became a key consideration in the court's finding that foster children have a right to an effective lawyer who is not burdened by excessive caseloads in dependency cases.

Other research and guidelines recommend smaller caseloads. In the QIC-ChildRep study, the adjusted caseload of the sample was 60 cases. That is, even when child representation occupied only a portion of a lawyer's practice, when the number of cases is adjusted for the percentage of effort required for child representation, the typical caseload was approximately 60 cases.

Data gained from the QIC-ChildRep shows benefits to smaller caseloads.<sup>29</sup> The QIC-ChildRep asked attorneys to do much more than appear in court, the theory being the more an attorney knows about the facts of the case and the competencies and challenges of his or her client the better he or she will be able to represent that client and that proper representation requires considerable work and advocacy outside of the courtroom. For child clients, where it is critical to observe the child in school and in placement settings and regularly communicate with collateral contacts such as teachers, foster parents and service providers, this could require several hours of effort a month per client. It is also the child's attorney's duty to independently verify the facts of the case.

A 2008 caseload study by the Judicial Council of California recommended a caseload of 77 clients per full-time dependency attorney to achieve an optimal best practice standard of performance.<sup>30</sup> The Massachusetts Committee for Public Counsel Services, which provides counsel for children and parents in dependency cases, enforces a caseload of 75 open cases.<sup>31</sup> In a very detailed systematic study, a Pennsylvania workgroup carefully broke down the tasks and expected time required throughout the life of a case and matched that to attorney hours available in a year. They concluded that caseloads for children's lawyers should be set at 65 per full time lawyer.<sup>32</sup>

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<sup>28</sup> NACC, Pitchal, Freundlich, and Kendrick, *Evaluation of the Guardian ad Litem System in Nebraska*, (December 2009) at 42-43, available at

[http://c.ymcdn.com/sites/www.naccchildlaw.org/resource/resmgr/nebraska/final\\_nebraska\\_gal\\_report\\_12.pdf](http://c.ymcdn.com/sites/www.naccchildlaw.org/resource/resmgr/nebraska/final_nebraska_gal_report_12.pdf)

<sup>29</sup> The QIC-Child Rep found a one-standard-deviation increase (20 cases) in the size of dependency caseload is associated with a 22 percent decrease in the monthly rate of investigation and document review and a 9 percent decrease in the monthly rate of legal case preparation activities.

<sup>30</sup> CA Dependency Counsel Caseload Standards A Report To The California Legislature April 2008 by the Judicial Council of California Administrative Office of the Courts Center for Families, Children & the Courts, available at <http://www.courtinfo.ca.gov/programs/cfcc/resources/publications/articles.htm>

<sup>31</sup> Massachusetts Policies and Procedures.

[https://www.publiccounsel.net/private\\_counsel\\_manual/CURRENT\\_MANUAL\\_2010/MANUALChap5links3.pdf](https://www.publiccounsel.net/private_counsel_manual/CURRENT_MANUAL_2010/MANUALChap5links3.pdf)

<sup>32</sup> 2014 Pennsylvania State Roundtable Report: Moving Children to Timely Permanency, available at <http://www.ocfcpacourts.us/childrens-roundtable-initiative/state-roundtable-workgroupscommittees/legal-representation/state-roundtable-reports>

Given the rights at stake for parents in dependency cases it is vital for parent attorneys to have reasonable caseloads. Ethical representation of parents in dependency proceedings requires considerable time and attention out of court. Legal scholars, practitioners and parents that have been involved with the system agree that it is the work done out of court that makes the biggest impact in dependency cases. Building trusting attorney-client relationships, being a counselor at law that helps a parent understand the system, working together to identify acceptable respite or substitute care options, developing safety plans, attending agency planning meetings, and identifying appropriate services all require a tremendous amount of time.

The higher the caseload, the less time an attorney will have to represent her client. Excessive caseloads make it harder for all attorneys to meet with clients, learn the facts of each particular case and prepare for court. This may result in increased frequency of scheduling conflicts, higher numbers of requests for continuances, undue delays in case resolution, and poor representation for all parties. The costs associated with each consequence are high for families and jurisdictions alike.

## **VII. Models of Delivering Legal Representation for Child Welfare Proceedings**

There are three predominant models of delivering legal representation for children and parents: centralized state or county government offices; independent offices that specialize in child welfare law; and private practitioners that are either appointed by judges or assigned to cases as members of a pool of attorneys who handle child welfare cases in a jurisdiction. The vast majority of attorneys representing children and parents fall into the last group, private practitioners. For this group of attorneys, child welfare law often accounts for only a portion of their practice.

Some government and private specialty law offices utilize a multi-disciplinary team approach, which pairs or provides attorneys with access to independent social workers and/or includes a peer parent advocate. Evaluations of models that employ these types of teams are yielding very positive results. Regardless of the type of attorney or model of representation -- standards of practice, reasonable caseloads, ongoing training, connections to support (such as social workers, peer parent advocates or investigators) and effective oversight are important factors in ensuring high quality legal representation. See Appendix A for descriptions of exemplary models of delivering parent and child representation.

### *Parent Representation*

The ABA Standards of Representation for Parents in Child Welfare Proceedings provide clear guidance that is applicable to all models of delivering parent representation. The standards emphasize the need for parent attorneys to be both counselors at law and zealous legal advocates. The counselor at law role requires an attorney to take the time to learn and understand their client's life circumstances, including their strengths and needs and the resources he or she has available. Such information is identified as critical to helping best represent the client.

The standards further articulate that helping clients understand when and how it is most important to cooperate with the child welfare agency is also crucial. Under the standards,

traditional, zealous legal representation is necessary, but insufficient to achieve the best outcomes for parents and families. Rather, the complexities of child welfare proceedings require the parent attorney to simultaneously assume multiple roles including: advisor, teacher and advocate. It is through this combination of roles that comprehensive representation and the best possible outcome are achieved.

CB strongly encourages all jurisdictions to provide legal representation to all parents in all stages of child welfare proceedings. CB further encourages all jurisdictions to consider providing such representation as part of a multi-disciplinary team.

### *Child Representation*

Regardless of the model of child representation, the QIC-ChildRep approach is a useful tool for states and individual practitioners to consider. The approach is based on an enhanced version of the ABA Standards of Legal Representation for Children and aligns very closely with procedural justice research. The model calls for proactive lawyering, advocacy and problem-solving.

The model encourages attorneys to utilize six [core skills](#): (1) enter the child's world; (2) assess child safety; (3) actively evaluate needs; (4) advance case planning; (5) develop a theory of the case; and (6) advocate effectively.<sup>33</sup> Taken together, the core skills empower attorneys to have a well-informed understanding of the particular strengths, needs, and resources of the child's family, and an understanding of the child's wishes (where they are able to be expressed). It is this vital individual child and family information that allows the attorney to take an active role in representing the child in case planning and to effectively advocate on his or her behalf.

While the QIC-ChildRep was developed specifically for child representation and the study looked exclusively at child representation, with minor modification the six core skills may be equally valuable for parent representation.

CB strongly encourages all jurisdictions to provide legal representation to all children and youth at all stages of child welfare proceedings. CB further encourages all jurisdictions to consider providing such representation as part of a multi-disciplinary team.

### *Child Welfare Agency Representation*

Many states do not currently provide adequate representation to the state's child welfare agencies or their contract agencies. The agency may be represented differently from county to county, or not directly at all. Consequently, the agency is often deprived of the benefits of having legal guidance in the investigation and disposition of their cases. Absent effective legal counsel, caseworkers lack the knowledge to be effective in court and may unwittingly fall into unlawful practice of law.

There are two basic models of representation for state and county government in child welfare proceedings: the agency representation model and the prosecutorial model. As the names

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<sup>33</sup>QIC ChildRep Model and Core Skills *available at*:  
<http://www.improvechildrep.org/DemonstrationProjects/BestPracticeModelSixCoreSkills.aspx>

suggest, the agency representation model provides for an attorney or office of attorneys that represents the public child welfare agency. Under this model, the attorney(s) provide legal counsel and advice to the child welfare agency leadership. This includes counsel on specific cases, overall legal approaches to the work, and policy. The agency attorney also represents the child welfare agency in court. Agency attorneys prepare all legal documents, filings and petitions for the agency and work closely with agency caseworkers to prepare them for court. Agency attorneys also play a critical role in holding case workers accountable. It is important to note, however, that the agency attorney does not represent the caseworker individually.

Under the prosecutorial model, the attorney represents the people or the state, much as a district or county prosecutor would in a criminal case. The prosecutorial model treats the agency as the complaining witness, as opposed to a client. Often attorneys operating under the prosecutorial model are employed by the state or county district attorney's office. Some attorneys practicing under this model may also practice criminal law; other offices exist as a separate unit within the prosecutor's office and handle exclusively child welfare cases. Under this model, the public child welfare agency does not have direct legal representation. This approach is not favored today.<sup>34</sup>

The agency representation model finds strong support in the ABA standards, existing research and efforts to protect against the unlawful practice of law. States will find a helpful resource in the ABA Standards of Practice for Lawyers Representing Child Welfare Agencies.

A 2016 study of dependency representation in Oregon identified inconsistent state and agency representation, a lack of uniform practice, and complicated financial models as challenges to timely and effective case planning and case management, stating that "obstacles to adequate and effective representation for all parties stand in the way of better outcomes for Oregon's children and families."<sup>35</sup>

Furthermore, the Oregon report found that a model of government representation that provides full representation for the agency in all hearings and out-of-court activities will ultimately eliminate the risk of unlawful practice of law by child welfare employees in the courtroom, and increase outcomes for children and families in Oregon. This recommendation would eliminate "the state" as a party to dependency cases and ensure the child welfare agency is fully represented and has access to consultation with counsel.

CB strongly encourages all jurisdictions to implement the agency representation model to ensure consistent legal representation that supports child welfare agencies to meet all federal requirements.

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<sup>34</sup> See Silverthorn, B. (2016) *Agency Representation in Child Welfare Proceedings*, Child Welfare Law and Practice: Representing Children, Parents and State Agencies in Abuse, Neglect, and Dependency Cases. Bradford

<sup>35</sup> See Oregon Task Force on Dependency Representation Report, July, 2016, available at [http://courts.oregon.gov/OJD/docs/OSCA/JFCPD/Juvenile/EYES-2016/Dependency%20Representation%20Task%20Force%20Report%20\(full\).pdf](http://courts.oregon.gov/OJD/docs/OSCA/JFCPD/Juvenile/EYES-2016/Dependency%20Representation%20Task%20Force%20Report%20(full).pdf)

## VIII. Best Practice Considerations

There are a number of strategies that a jurisdiction can employ to ensure high quality legal representation for all parties in child welfare proceedings. Each of the below can be adjusted in scale and approach to meet the unique characteristics and resources available in all jurisdictions. There are also a number of best practices that attorney offices or independent attorneys practicing child welfare law can adopt to provide high quality legal representation. Both structural and attorney best practices are included below.

### *Structural Best Practices to Ensure High Quality Legal Representation*

- Adopt, implement, and monitor statewide standards of practice for parents' attorneys, children's attorneys and agency attorneys.
- Implement binding authority or constitutional protection requiring parents, children and youth to be appointed legal counsel at or before the initial court appearance in all cases.
- Develop a formal oversight system for parents' attorneys and children's attorneys to ensure quality assurance. This can be achieved through the creation of an office, the addition of a division to an existing office such as the public defender's office, as a duty for the presiding family court judge, through the work of a committee or by any other means that are used to ensure accountability and continuous quality improvement. In determining the assignment of oversight responsibilities, it is important to address any conflict of interest issues.
- Require mandatory initial child welfare training for parents' attorneys, children's attorneys and agency attorneys. Where resources do not exist for in-person training or geographical challenges make attendance difficult, states are encouraged to explore distance learning and online training experiences.
- Institute mandatory annual training requirements for parents' attorneys, children's attorneys and agency attorneys. Child welfare law and regulations and court rules change regularly at the state and federal level. It is important to have an effective way to keep all attorneys up-to-date. Annual update or "booster shot" trainings are one effective way to ensure all practitioners are kept current in law and practice.
- Support adequate payment and benefits to "professionalize" this type of law practice, and move from a contract system with competing priorities to an employment system like other indigent and state agency representation.
- Support a payment system for parent and child representation that is designed to promote high quality, ethical legal representation and discourages overly large caseloads.

### *Attorney Best Practices to Provide High Quality Legal Representation*

- Communicate regularly with clients (at least monthly and after all significant developments or case changes) and in-person when possible.
- Ensure that language translation services and other accommodations to ensure equal access and full participation in all processes are available to all clients at all stages of child welfare proceedings.
- Thoroughly prepare for and attend all court hearings and reviews.



- Thoroughly prepare clients for court, explain the hearing process and debrief after hearing are complete to make sure clients understand the results. For children this must be done in a developmentally appropriate way.
- Regularly communicate with collateral contacts (i.e., treatment providers, teachers, social workers).
- Meet with clients outside of court (this provides attorneys an opportunity to observe clients in multiple environments and independently verify important facts).
- Conduct rigorous and complete discovery on every case.
- Independently verify facts contained in allegations and reports.
- Have meaningful and ongoing conversation with all clients about their strengths, needs, and wishes.
- Regularly ask all clients what would be most helpful for his or her case, what is working, and whether there is any service or arrangement that is not helpful, and why.
- Work with every client to identify helpful relatives for support, safety planning and possible placement.
- Attend and participate in case planning, family group decision-making and other meetings a client may have with the child welfare agency.
- Work with clients individually to develop safety plan and case plan options to present to the court.
- File motions and appeals when necessary to protect each client's rights and advocate for his or her needs.

## **IX. Conclusion**

The child welfare system is intended to keep families safe, together and strong, and where that is not possible to find the next best option for children and youth. To realize this potential it is critical that children and families experience the system as transparent and fair, one in which rights are protected and options are known, co-created and understood. Providing high quality legal representation to all parties at all stages of dependency proceedings is crucial to realizing these basic tenets of fairness and due process under the law. Moreover, research shows that legal representation for all parties in child welfare proceedings is clearly linked to increased party engagement, improved case planning, expedited permanency and cost savings to state government. CB strongly encourages all jurisdictions to work together to ensure all parties receive high quality legal representation at all stages of dependency proceedings.

**Inquiries:** CB Regional Program Managers

/ s /

Rafael López  
 Commissioner  
 Administration on Children, Youth & Families

**Attachments:**

A - Models of Delivering Parent Representation

B - CB Regional Office Program Managers

**RESOURCES**

ABA Standards of Representation for Parents, Children, and Child Welfare Agencies

[http://www.americanbar.org/groups/child\\_law/tools\\_to\\_use.html](http://www.americanbar.org/groups/child_law/tools_to_use.html)

NACC Child Welfare Legal Specialist Certification (CWLS)

<http://www.naccchildlaw.org/?page=certification>

Quality Improvement Center for the Representation of Children in the Child Welfare System.  
(QIC-ChildRep) Practice Model

<http://www.improvechildrep.org/DemonstrationProjects/QICChildRepBestPracticeModel.aspx>

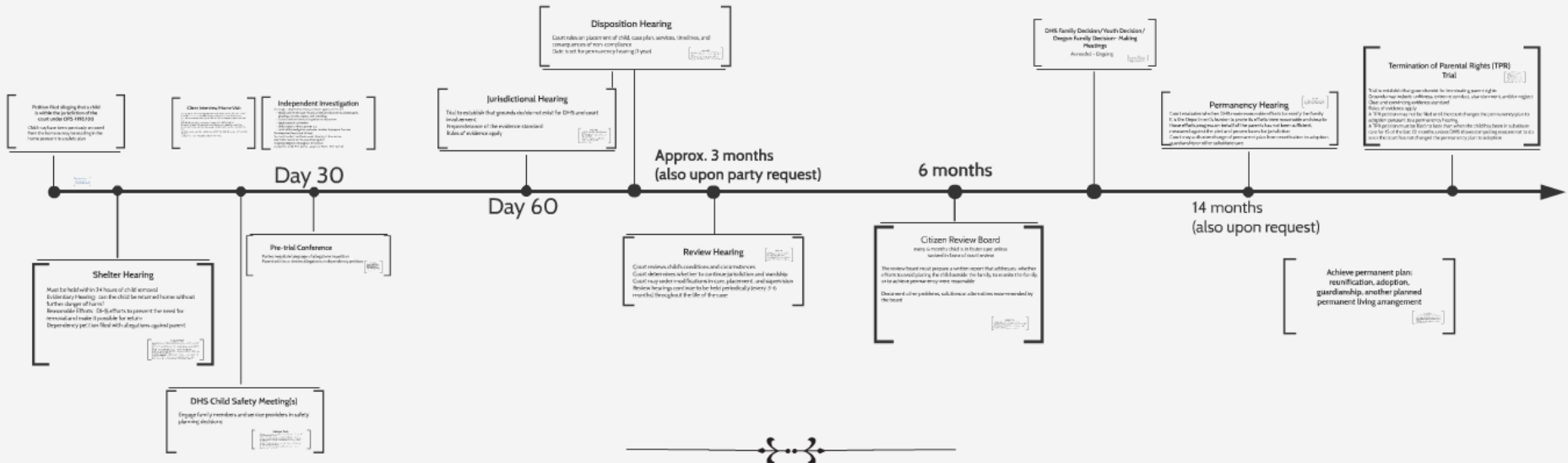
NCJFCJ Enhanced Resource Guidelines

<http://www.ncjfcj.org/ncjfcj-releases-enhanced-resource-guidelines>

Child Welfare Capacity Building Center for Courts

<https://capacity.childwelfare.gov/courts/>

## The Lawyer's Role in Oregon Juvenile Dependency Proceedings (as informed by the Oregon State Bar Performance Standards for Representation in Juvenile Dependency Cases)



**Petition filed alleging that a child  
is within the jurisdiction of the  
court under ORS 419B.100**

Child may have been previously removed  
from the home or may be residing in the  
home pursuant to a safety plan

## Factors which lawyers should consider throughout the case:

- *The client's decision-making capacity as it changes over time (particularly relevant to the child client) (Lawyer for Child Perf. Std. 1A.,1B. & 2A.)*
- *Cultural competency (Lawyer for Child Perf. Std.2C., Lawyer for Parent Perf. Std. 2H.)*
- *Developmentally appropriate representation and trauma-informed practice (Lawyer for Child Perf. Std. 2C.)*
- *Unique issues of incarcerated parents (Lawyer for Parent Perf. Std. 2J.)*
- *Educational, mental health and health needs (Lawyer for Child Perf. Std. 2G.)*
- *Expanding the scope of representation and taking action on collateral issues when appropriate to address client needs: custody issues, school related issues, crossover with the delinquency system, SSI and public benefits, paternity, administrative challenges to DHS findings of abuse and neglect, developmental disability qualification (Lawyer for Child Perf. Std. 2I., Lawyer for Parent Perf. Std. 2K.)*

# Shelter Hearing

Must be held within 24 hours of child removal

Evidentiary Hearing: can the child be returned home without further danger of harm?

Reasonable Efforts: DHS efforts to prevent the need for removal and make it possible for return

Dependency petition filed with allegations against parent

## Lawyer Role

Obtain and review discovery: shelter report, police report, prior child welfare history (Perf. Std. App. C.(A)(1) & D.(A)(1))  
Interview client prior to hearing: purpose of hearing, placement preference, caution the client about self-incrimination, inquire into other available relatives or safety service providers (Perf. Std. App. C.(A)(2) & D.(A)(2))  
Assist client in exercising his or her right to an evidentiary hearing (Perf. Std. App. D.(A)(4))  
Identify and assess legal issues: jurisdictional sufficiency of the petition, appropriateness of venue, paternity, ICWA, notice, reasonable efforts to prevent the need for removal, removal not in best interest of the child (Perf. Std. App. C.(A)(5) & D.(A)(5))  
Argue for temporary orders: visitation, safety plan, placement, services, continued school placement (Perf. Std. App. C.(A)(3-4) & D.(A)(7))  
Review order with client to discuss judicial review and appeal (Perf. Std. App. C.(A)(5) & D.(A)(9))  
Review consequences with client of not abiding by order (Perf. Std. App. C.(A)(5) & D.(A)(10))

# Lawyer Role

Obtain and review discovery: shelter report, police report, prior child welfare history (Perf. Std. App. C.(A)(1) & D.(A)(1))

Interview client prior to hearing: purpose of hearing, placement preference, caution the client about self-incrimination, inquire into other available relatives or safety service providers (Perf. Std. App. C.(A)(2) & D.(A)(2))

Assist client in exercising his or her right to an evidentiary hearing (Perf. Std. App. D.(A)(4))

Identify and assess legal issues: jurisdictional sufficiency of the petition, appropriateness of venue, paternity, ICWA, notice, reasonable efforts to prevent the need for removal, removal not in best interest of the child (Perf. Std. App. C.(A)(5) & D.(A)(5))

Argue for temporary orders: visitation, safety plan, placement, services, continued school placement (Perf. Std. App. C.(A)(3-4) & D.(A)(7))

Review order with client to discuss judicial review and appeal (Perf. Std. App. C.(A)(5) & D.(A)(9))

Review consequences with client of not abiding by order (Perf. Std. App. C.(A)(5) & D.(A)(10))

# Client Interview/Home Visit

Required within 72 hours of appointment for children (Lawyer for Child Perf. Std. 2A.)  
and within 72 hours when feasible for parents (Lawyer for Parent Perf. Std 2A.)

Describe role of attorney (Lawyer for Child Perf. Std. 2B., Lawyer for Parent Perf. Std. 2C.)

Visit child client in child's environment (Lawyer for Child Perf. Std. 2A)

Counsel client about all legal matters related to the case: allegations against the parents, rights of parents, steps to promote reunification (Lawyer for Parent Perf. Std. 2C.)

Identify pressing needs/barriers (Lawyer for Child Perf. Std, 2G., Lawyer for Parent Perf. Std. 2C.)

Develop case timeline (Lawyer for Parent Perf. Std. 2D.)



# DHS Child Safety Meeting(s)

Engage family members and service providers in safety planning decisions

## Lawyer Role

Advocate for client's wishes regarding the safety plan (Lawyer for Child Perf. Std. 4A., Lawyer for Parent Perf. Std. 4A.)  
Advise and assist client regarding the role of DHS and Juvenile Court process  
Cooperate and communicate with professionals to learn about client's progress and their views of the case (Lawyer for Child Perf. Std. 4C., Lawyer for Parent Perf. Std. 4C.)  
Advocate for services and visitation as appropriate (Lawyer for Child Perf. Std. 4E., Lawyer for Parent Perf. Std. 4E.-F.)  
Identify family members and professionals who may be (or become) a resource (Lawyer for Parent Perf. Std. 4A.)

# Lawyer Role

Advocate for client's wishes regarding the safety plan (Lawyer for Child Perf. Std. 4A., Lawyer for Parent Perf. Std. 4A.)

Advise and assist client regarding the role of DHS and Juvenile Court process

Cooperate and communicate with professionals to learn about client's progress and their views of the case (Lawyer for Child Perf. Std. 4C., Lawyer for Parent Perf. Std. 4C.)

Advocate for services and visitation as appropriate (Lawyer for Child Perf. Std. 4E., Lawyer for Parent Perf. Std. 4E.-F.)

Identify family members and professionals who may be (or become) a resource (Lawyer for Parent Perf. Std. 4A.)

# Pre-trial Conference

Parties negotiate language of allegations in petition

Parent admits or denies allegations in dependency petition

## Lawyer Role

When appropriate, prepare and participate in settlement negotiations to resolve the case quickly. Sources for Child Pet. SA, IC, Lapses for Pet. SA, IC, Review and Develop legal and fact arguments including discovery, investigative reports, witness case law, and the children's code. Pet. SA App. C.0015 C.0016  
Create client & informed of and understand nature, obligation and consequences of decision. Pet. SA App. C.0015 C.0016  
Review orders with the client and advise the client regarding how to appeal or post the order. Pet. SA App. C.0016 C.0015  
Present trial methods. Signed as appropriate. Pet. SA App. C.0015 C.0016

# Lawyer Role

When appropriate, promote and participate in settlement negotiations to resolve the case quickly (Lawyer for Child Perf. Std. 6C., Lawyer for Parent Perf. Std. 6C.)

Review and prepare legal and fact arguments including pleadings, discovery, investigative reports, statutes, case law, and the evidence code (Perf. Std. App. C.(B)(1) & D.(B)(1))

Ensure client is informed of and understands nature, obligation and consequences of decisions (Perf. Std. App. C.(B)(3) & D.(B)(3))

Review orders with the client and advise the client regarding issues for appeal or post-trial motion(s) (Perf. Std. App. C.(B)(4) & D.(B)(3))

File post-trial motion(s)/appeal as appropriate (Perf. Std. App. C.(A)(1) & D.(B)(4))

# Independent Investigation

Thorough, independent review and investigation of the case

- Obtain and review case file and all relevant documents, photographs, pleadings, records, reports, and recordings
- Contact and interview other parties and witnesses
- Legal research and review
- Utilize experts where appropriate
- Work with investigators and social workers to prepare the case

Develop case theory and strategy

Counsel the client well before each hearing, in time to use client information for the case investigation

Ongoing obligation throughout life of case

(Lawyer for Child Perf. Std. 5, Lawyer for Parent Perf. Std. 5)

# Jurisdictional Hearing

Trial to establish that grounds do/do not exist for DHS and court involvement

Preponderance of the evidence standard

Rules of evidence apply

## Lawyer Role

Review and prepare legal and fact arguments including pleadings, discovery, investigative reports, statutes, case law, and the evidence code (Perf. Std. App. C, IR(1) & D, IR(1))  
Require opening and closing statements, direct and cross examination plans (Perf. Std. App. C, IR(2) & D, IR(2))  
Prepare parent/client to testify with a focus on the impact of potential criminal liability (Perf. Std. App. D, IR(2))  
Ensure client is informed of and understands the nature, obligation and consequences of his or her disclosure (Perf. Std. App. C, IR(3) & D, IR(3))  
Review orders with the client and advise the client regarding issues for appeal or post-trial motions (Perf. Std. App. C, IR(4) & D, IR(4))  
File post-trial motions/appeal as appropriate (Perf. Std. App. C, IR(5) & D, IR(5))

# Lawyer Role

Review and prepare legal and fact arguments including pleadings, discovery, investigative reports, statutes, case law, and the evidence code (Perf. Std. App. C.(B)(1) & D.(B)(1))

Prepare opening and closing statements, direct and cross examination plans (Perf. Std. App. C.(B)(2) & D.(B)(2))

Prepare parent client to testify with a focus on the impact of potential criminal liability (Perf. Std. App. D.(B)(2))

Ensure client is informed of and understands the nature, obligation and consequences of his or her decisions (Perf. Std. App. C.(B)(3) & D.(B)(3))

Review orders with the client and advise the client regarding issues for appeal or post-trial motion(s) (Perf. Std. App. C.(B)(4) & D.(B)(3))

File post-trial motion(s)/appeal as appropriate (Perf. Std. App. C.(A)(1) & D.(B)(4))

# Disposition Hearing

Court rules on placement of child, case plan, services, timelines, and consequences of non-compliance

Date is set for permanency hearing (1 year)

## Lawyer Role

Present a disposition plan on behalf of client, advocating for least restrictive disposition possible (Perf. Std. App. C.02)(1) & D.02(4)  
Move for dismissal of the jurisdictional petition when appropriate (Perf. Std. App. C.02)(1) & D.02(1)  
Respond to inaccurate or untrustworthy information presented by other parties (Perf. Std. App. C.02)(1) & D.02(1)  
Make appropriate motions (placement, visitation, services) (Perf. Std. App. C.02)(1) & D.02(1)  
Identify and present all mitigating factors (Perf. Std. App. C.02)(1) & D.02(1)  
Ensure client is informed of obligations and consequences (Perf. Std. App. C.02)(1) & D.02(1)  
Explain client's rights and possibilities of post-trial review(s) and the right to appeal (Perf. Std. App. C.02)(1) & D.02(1)



# Lawyer Role

Present a disposition plan on behalf of client, advocating for least restrictive disposition possible (Perf. Std. App. C.(C)(2) & D.(C)(4))

Move for dismissal of the jurisdictional petition when appropriate (Perf. Std. App. C.(C)(1) & D.(C)(3))

Respond to inaccurate or unfavorable information presented by other parties (Perf. Std. App. C.(C)(3) & D.(C))

Make appropriate motions (placement, visitation, services) (Perf. Std. App. C.(C)(5) & D.(C)(5))

Identify and present all mitigating factors (Perf. Std. App. C.(C)(4) & D.(C))

Ensure client is informed of obligations and consequences (Perf. Std. App. C.(1)() & D.(C)(5))

Explain client's rights and possibilities of post-trial motion(s) and the right to appeal (Perf. Std. App. C.(C)(5) & D.(C)(5))

# Review Hearing

## Lawyer Role

Independent investigation review file, interview witnesses, obtain discovery (Part 261, App. C D(2) & D(4)(B))  
Prepare for and make appropriate motions. Seek jurisdiction to continue, placement, visitation services (Part 261, App. C D(3) & D(1)(D))  
Consider adoptions, written report (Part 261, App. C D(8) & D(1)(D))  
Prepare specific findings and orders that advance the client's position, services, education, visitation (Part 261, App. C D(1)(D) D(1)(E))  
Engage in communication before hearings or when a significant change of circumstances or significant event occurs (Lawyer for Child Part 261.20, Lawyer for Parent Part 261.20)  
Police order with client for access (Many times, rights and obligations) (Part 261, App. D D(4))

Court reviews child's conditions and circumstances  
Court determines whether to continue jurisdiction and wardship  
Court may order modifications in care, placement, and supervision  
Review hearings continue to be held periodically (every 3-6 months) throughout the life of the case

# Lawyer Role

Independent investigation: review file, interview witnesses, obtain discovery (Perf. Std. App. C.(D)(2) & D.(D)(1))

Prepare for and make appropriate motions (basis for jurisdiction to continue, placement, visitation, services) (Perf. Std. App. C.(D)(3) & D.(D)(2))

Consider submitting a written report (Perf. Std. App. C.(D)(3) & D.(D)(2))

Request specific findings and orders that advance the client's position (services, education, visitation) (Perf. Std. App. C.(D)(4) & D.(D)(3))

Regular communication before hearings or when a significant change of circumstances or significant event occurs (Lawyer for Child Perf. Std. 2A., Lawyer for Parent Perf. Std. 2A.)

Review order with client to discuss statutory time-lines, rights and obligations (Perf. Std. App. D.(D)(4))

# DHS Family Decision/Youth Decision/ Oregon Family Decision- Making Meetings

As needed - Ongoing

#### Lawyer Role

Advocate for the client's wishes regarding the safety plan (Lawyer for Child Ref. Std. 4A, Lawyer for Parent Ref. Std. 4A)  
Advise and assist the client regarding use of DHS and Juvenile Court process  
Cooperate and communicate with professionals to learn about the client's progress and their views of the case (Lawyer for Child Ref. Std. 4C, Lawyer for Parent Ref. Std. 4C)  
Advocate for services and visitation as appropriate (Lawyer for Child Ref. Std. 4E, Lawyer for Parent Ref. Std. 4E, 4F)  
Identify family members and professionals who may be or become a resource (Lawyer for Parent Ref. Std. 4A)

# Lawyer Role

Advocate for the client's wishes regarding the safety plan (Lawyer for Child Perf. Std. 4A., Lawyer for Parent Perf. Std. 4A.)

Advise and assist the client regarding role of DHS and Juvenile Court process

Cooperate and communicate with professionals to learn about the client's progress and their views of the case (Lawyer for Child Perf. Std. 4C., Lawyer for Parent Perf. Std. 4C.)

Advocate for services and visitation as appropriate (Lawyer for Child Perf. Std. 4E., Lawyer for Parent Perf. Std. 4E.-F.)

Identify family members and professionals who may be (or become) a resource (Lawyer for Parent Perf. Std. 4A.)

# Citizen Review Board

every 6 months child is in foster care unless  
waived in favor of court review

The review board must prepare a written report that addresses: whether efforts to avoid placing the child outside the family, to reunite the family, or to achieve permanency were reasonable

Document other problems, solutions or alternatives recommended by the board

## Lawyer Role

Independent investigation: review file, interview witnesses, obtain discovery (Prof. Stat. App. C (D)(2) & D(2)(E))  
Present information supporting child's position and defend her position and taking the necessary steps to achieve the best plan in a timely fashion (Prof. Stat. App. C (D)(2) & D(2)(E))  
Prepare for and make appearance at evidentiary hearings for jurisdiction to continue, placement, visitation services (Prof. Stat. App. C (D)(2) & D(2)(E))  
Consider submitting a written report (Prof. Stat. App. C (D)(2) & D(2)(E))  
Respond to the findings and orders that advance the child's position (adoption, reunification, visitation) (Prof. Stat. App. C (D)(2) & D(2)(E))  
Maintain regular client communication before hearings in when significant change of circumstances occur (Prof. Stat. App. C (D)(2) & D(2)(E))  
Represent child's best interests to become statutory beneficiaries, rights and obligations (Prof. Stat. App. C (D)(2) & D(2)(E))

# Lawyer Role

Independent investigation: review file, interview witnesses, obtain discovery (Perf. Std. App. C.(D)(2) & D.(D)(1))

Present information supporting client's position and whether parties are taking the necessary steps to achieve the chosen plan in a timely fashion (Perf. Std. App. C.(D)(3) & D.(D)(2))

Prepare for and make appropriate motions and arguments (basis for jurisdiction to continue, placement, visitation, services) (Perf. Std. App. C.(D)(3) & D.(D)(2))

Consider submitting a written report (Perf. Std. App. C.(D)(3) & D.(D)(2))

Request specific findings and orders that advance the client's position (services, education, visitation) (Perf. Std. App. C.(D)(4) & D.(D)(3))

Maintain regular client communication before hearings or when a significant change of circumstances or significant event occurs (Lawyer for Child Perf. Std. 2A., Lawyer for Parent Perf. Std. 2A.)

Review order with the client to discuss statutory time-lines, rights and obligations (Perf. Std. App. D.(D)(4))

# Permanency Hearing

**Lawyer Role**  
This page contains a summary of the lawyer's role in the permanency hearing process. For more information, please contact the Department of Social Services, Family Support Services, at (714) 947-2000. This page is intended to provide information and is not intended to constitute legal advice. For more information, please contact your lawyer. The Department of Social Services is not responsible for any errors or omissions in this document. © 2014 Department of Social Services. All rights reserved. For more information, please contact your lawyer. www.dss.ca.gov

Court evaluates whether DHS made reasonable efforts to reunify the family  
It is the Department's burden to prove its efforts were reasonable and despite those efforts progress on behalf of the parents has not been sufficient, measured against the pled and proven bases for jurisdiction  
Court may authorize change of permanent plan from reunification to adoption, guardianship or other substitute care



# Lawyer Role

Take particular care in preparing to ensure the lawyer is well acquainted with case history and files involving the family (Perf. Std. App. C.(E) & D.(E))

Conduct an independent investigation (Lawyer for Child Perf. Std. 5, Perf. Std. App. D.(E)(2))

Present evidence on what the permanent plan for the child should be including whether to continue a plan of reunification, a motion to dismiss, or implementation of a permanent plan (Perf. Std. App. C.(E)(3) & D.(E)(3))

Adequately and zealously present the client's position, including witness testimony (Perf. Std. App. C.(E) & D.(E)(3))

Request specific findings and orders that advance the client's position (specific extension of time for reunification if appropriate and services and progress required during that time) (Perf. Std. App. C.(D)(4) & D.(E)(4))

Carefully review the order with the client and discuss the client's option to review including appellate review of any final orders ((Perf. Std. App. C.(D)(5) & D.(E)(5))

# Achieve permanent plan: reunification, adoption, guardianship, another planned permanent living arrangement

## Lawyer Role

While the government plan is being implemented, the lawyer will:  
Actively represent the client in court hearings and CRB reviews (Lawyer for Child  
Perf. Std. 4A, Lawyer for Parent Perf. Std. 4A.)  
Participate in CHS or other service provider meetings and engage in case planning  
(Lawyer for Child Perf. Std. 4E, Lawyer for Parent Perf. Std. 4E.)  
Continue to investigate the case (Lawyer for Child Perf. Std. 5, Lawyer for Parent  
Perf. Std. 5.)  
Continue to have regular, ongoing client contact (Lawyer for Child Perf. Std. 2A,  
Lawyer for Parent Perf. Std. 2A.)

# Lawyer Role

While the permanent plan is being implemented, the lawyer will:

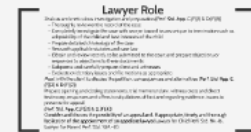
Actively represent the client in court hearings and CRB reviews (Lawyer for Child Perf. Std. 4A., Lawyer for Parent Perf. Std. 4A.)

Participate in DHS or other service provider meetings and engage in case planning (Lawyer for Child Perf. Std. 4E., Lawyer for Parent Perf. Std. 4E.)

Continue to investigate the case (Lawyer for Child Perf. Std. 5, Lawyer for Parent Perf. Std. 5)

Continue to have regular, ongoing client contact (Lawyer for Child Perf. Std. 2A., Lawyer for Parent Perf. Std. 2A.)

# Termination of Parental Rights (TPR) Trial



Trial to establish that grounds exist for terminating parent rights

Grounds may include: unfitness, extreme conduct, abandonment, and/or neglect

Clear and convincing evidence standard

Rules of evidence apply

A TPR petition may not be filed until the court changes the permanency plan to adoption pursuant to a permanency hearing

A TPR petition must be filed no later than when the child has been in substitute care for 15 of the last 22 months, unless DHS shows compelling reasons not to do so or the court has not changed the permanency plan to adoption



# Lawyer Role

Zealous and meticulous investigation and preparation (Perf. Std. App. C.(F)(1) & D.(F)(1))

- Thoroughly review entire record of the case
- Completely investigate the case with an eye toward issues unique to termination such as adoptability of the child and best interests of the child
- Prepare detailed chronology of the case
- Research applicable statutes and case law
- Obtain and review records to be submitted to the court and prepare objections or responses to objections to these documents
- Subpoena and carefully prepare client and witnesses
- Evaluate evidentiary issues and file motions as appropriate

Meet with the client to discuss the petition, consequences and alternatives (Perf. Std. App. C.(F)(2) & D.(F)(2))

Prepare opening and closing statements, trial memorandum, witness cross and direct testimony, responses and offers to stipulations of fact and regarding evidence, issues to preserve for appeal

(Perf. Std. App. C.(F)(3) & D.(F)(4))

Consider and discuss the possibility of an appeal and, if appropriate, timely and thorough facilitation of the appointment of an appellate lawyer (Lawyer for Child Perf. Std. 9A.-B., Lawyer for Parent Perf. Std. 10A.-B.)

Oregon State Bar

# Report of the Task Force on Standards of Representation in Juvenile Dependency Cases

**June 27, 2014**

# Foreword

The original version of the Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases (hereafter, the performance standards) was approved by the Board of Governors on September 25, 1996. Significant changes to the original performance standards were adopted in 2006, and an additional set of standards pertaining to representation in post-conviction standards were adopted in 2009.

As noted in the earlier revision, in order for the performance standards to continue to serve as valuable tools for practitioners and the public, they must be current and accurate in their reference to federal and state laws and they must incorporate evolving best practices.

The Foreword to the original performance standards noted that “[t]he object of these [g]uidelines is to alert the attorney to possible courses of action that may be necessary, advisable, or appropriate, and thereby to assist the attorney in deciding upon the particular actions that must be taken in a case to ensure that the client receives the best representation possible.” This continues to be the case, as does the following, which was noted in both the Foreword in the 2006 revision and the Foreword to the 2009 post-conviction standards:

“These guidelines, as such, are not rules or requirements of practice and are not intended, nor should they be used, to establish a legal standard of care. Some of the guidelines incorporate existing standards, such as the Oregon Rules of Professional Conduct, however which are mandatory. Questions as to whether a particular decision or course of action meets a legal standard of care must be answered in light of all the circumstances presented.”

We hope that the revised Performance Standards, like the originals, will serve as a valuable tool both to the new lawyer or the lawyer who does not have significant experience in criminal and juvenile cases, and to the experienced lawyer who may look to them in each new case as a reminder of the components of competent, diligent, high quality legal representation.



Tom Kranovich  
Oregon State Bar President

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# Report of the Task Force on Standards of Representation in Juvenile Dependency Cases

## Summary and Background

In September of 1996, the Oregon State Bar Board of Governors approved the Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases. In May of 2006, the Board accepted revisions to the 1996 standards. In 2012, at the direction of the OSB Board of Governors, two separate workgroups began meeting to work on significant revisions to the standards in criminal, delinquency and dependency cases. One group focused on juvenile dependency standards and the other on adult criminal and juvenile delinquency standards.

The task force created to address Juvenile Dependency standards included members from academia as well as from both private practice and public defender offices. Task force members were Julie McFarlane, Supervising Attorney, Youth, Rights & Justice; Shannon Storey, Office of Public Defense Services; Joseph Hagedorn, Metro Public Defender; Leslie Harris, University of Oregon Law School; Tahra Sinks, private practice in Salem; LeAnn Easton, Dorsay & Easton LLP; and Joanne Southey, Department of Justice Civil Enforcement Division.

The following pages include new standards produced by the juvenile dependency task force which are recommended to replace what is currently published on the OSB website as the third specific standard “Specific Standards for Representation in Juvenile Dependency Cases”. These changes, when combined with the revisions recently made to the second specific standard (Criminal and Juvenile Delinquency) may make the “general standards” in Section 1 duplicative, as the material covered broadly in the that document is now included in more details both in the Criminal and Juvenile sections.

The goal of this task force was to create a revised set of standards that was both easy for the practitioner to read and understand and also provide relevant detail and explanations as necessary. As with the criminal standards, this task force sought to include, in addition to the rules and implementation sections, commentary to both explain the rationale behind the individual standards and to provide relevant real world examples when possible. Thus each section of the standards includes the “black letter” standard itself, one or more “Actions” to

guide the practitioner in achieving the standard and then Commentary to more fully explain the Actions and the Standard.<sup>1</sup>

It became very clear to members of the task force throughout this process that customs and practices in juvenile dependency cases vary widely from county to county in Oregon. While some of these differences may be more stylistic than substantive, some may have a significant impact on the rights of children and parents. One of the goals in writing the action and commentary sections of the standards was identify for attorneys best practices that may differ from the custom in their jurisdiction. While this knowledge may not always result in a change in local court practice, reference to the standards may be persuasive to a lawyer who is attempting to convince a court to deviate from its traditional practice.

One criticism of the previous version of the juvenile standards was that some sections were essentially long checklists without much explanation as to why items on the list were important. Additionally, because of the desire to make sure every contingency was covered, checklists often become impractically long, which made them less useful for the reader. The task force felt that it was preferable to replace these sections with a more through explanation of the material.

However, the workgroup did feel that there was some value in checklists in that they can provide inexperienced practitioners with a visual aid to help them to avoid forgetting important tasks or issues. For this reason, much of the information that was previously included in the checklists contained in the standards has been moved to an appendix at the end of the new juvenile standards section.

Another very important change made in this version of the juvenile standards was bifurcating the juvenile standards into a section for lawyers representing children and a section for lawyers representing parents. While there is considerable overlap between these two sections, and while this choice does make the overall standards much longer, it was felt that this created a more useful product for practitioners. When standards for lawyers of parents and children are combined, it becomes critical to frequently interrupt sections with discussions of exceptions or special cases that are applicable to only some of the readers. By separating these into two different parallel sections, each section can be more streamlined and more focused on the needs of the reader. While some sections may have very similar structures, and may in fact repeat the exact same language, other sections are extremely different.

For example in forming and maintaining the lawyer-client relationship, lawyers for children are confronted with the reality that their clients may not yet have a fully developed understanding of their situation or of the nature of the proceeding. Lawyers for children must carefully consider their client's mental development and their decision-making capacity.

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<sup>1</sup> The Juvenile Dependency Task Force preferred the term "Action" to the term "Implementation" that is use in the criminal standards and in the previous version of the juvenile standards. However, this decision is largely stylistic, and the "Implementation" and "Action" items listed in each document serve the same purpose.

Lawyers for parents, on the other hand, have a more straightforward attorney-client relationship with fewer complications and pitfalls based on their client's capacity.

Both sections, as well as the appendices, are included in the report below. However, when publishing this material online, it may be advisable to break the sections up into separate documents for ease of reading or printing.

Throughout the process of creating these revised standards, the task force has sought input from practitioners and judges and has incorporated suggestions when appropriate.

The Obligations of the Lawyer for Children begins on page 4.

The Obligations of the Lawyer for Parents begins on page 44.

The appendixes begin on page 85.

# THE OBLIGATIONS OF THE LAWYER FOR CHILDREN IN CHILD PROTECTION PROCEEDINGS WITH ACTION ITEMS AND COMMENTARY

## STANDARD 1 - ROLE OF LAWYER FOR THE CHILD

- A. **The role of the lawyer for the child is to ensure that the client is afforded due process and other rights and that the client's interests are protected. For a child with full decision-making capacity, the lawyer must maintain a normal lawyer-client relationship with the child, including taking direction from the child on matters normally within the client's control.**

Action:

Consistent with Rule 1.14 of the ORCP, the child's lawyer should determine whether the child has sufficient maturity to understand and form a lawyer-client relationship and whether the child is capable of making reasoned judgments and engaging in meaningful communication.

Action:

The lawyer must explain the nature of all legal and administrative proceedings to the extent possible, and, given the client's age and ability, determine the client's position and goals. The child's lawyer also acts as a counselor and advisor. This involves explaining the likelihood of achieving the client's goals and, where appropriate, identifying alternatives for the client's consideration. In addition, the lawyer for the child should explain the risks, if any, inherent in the client's position. Once the child has settled on positions and goals, the lawyer must vigorously advocate for them.

Action:

The child's lawyer should not confuse inability to express a preference with unwillingness to express a preference. If an otherwise competent child chooses not to express a preference on a particular matter, the child's lawyer should determine if the child wishes the lawyer to take no position in the proceeding or if the child wishes the lawyer or someone else to make the decision for him or her. In either case, the lawyer is bound to follow the client's direction.

Action:

The lawyer may not request the appointment of a Court Appointed Special Advocate (CASA) or other advocate for the child's best interests where the child is competent to make decisions.

Commentary:

When a child client has the capacity to instruct the lawyer, the lawyer-client relationship is fundamentally indistinguishable from the lawyer-client relationship in any other situation and includes duties of client direction, confidentiality, diligence, competence, loyalty and communication and the duty to provide independent advice.

The ability of a child client to express a preference constitutes a threshold requirement for determining ability to instruct the lawyer. When the lawyer can discern the client's preference through investigation rather than eliciting the child's own verbally articulated position the lawyer must advocate for that preference.

When a child client is capable of instructing the lawyer, decisions that are ultimately the client's to make include whether to:

- 1) Contest, waive trial on petition, negotiate changes in or testify about the allegations in the petition;
- 2) Stipulate to evidence that is sufficient to form a basis for jurisdiction and commitment to the custody of DHS;
- 3) Accept a conditional postponement or dismissal; or
- 4) Agree to specific services or placements.

As with any client, the child's lawyer may counsel against the pursuit of a particular position sought by the child. Without unduly influencing the child, the lawyer should advise the child by providing options and information to assist the child in making decisions. The lawyer should explain the practical effects of taking various positions, the likelihood that a court will accept particular arguments and the impact of such decisions on the child, other family members, and future legal proceedings. The child's lawyer should recognize that the child may be more susceptible to intimidation and manipulation than some adult clients. Therefore, the child's lawyer should ensure that the decision the child ultimately makes reflects his or her actual position.

- B. For a child client with diminished capacity, the child's lawyer should maintain a normal lawyer-client relationship with the child as far as reasonably possible and take direction from the child as the child develops capacity. A child may have the capacity to make some decisions but not others.**

Commentary:

The question of diminished capacity should not arise unless the lawyer has some reason to believe that the client does not have the ability to make an adequately considered decision. A child's age is not determinative of diminished capacity. The commentary to the ABA Model Rule of Professional Responsibility upon which ORCP 1.14 is based recognizes that there exist "intermediate degrees of competence" and that "children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody."

The assessment of a child's capacity must be based upon objective criteria, not the lawyer's personal philosophy or opinion. The assessment should be grounded in insights from child development science and should focus on the child's decision-making process rather than the child's choices themselves. Lawyers should be careful not to conclude that the child suffers diminished capacity from a client's insistence upon a course of action that the lawyer considers unwise or at variance with lawyer's view. For example, the decision of a thirteen-year-old to return home to a marginally fit parent may not be in the child's best interests, but the child may well be competent to make that decision.

In determining whether a child has diminished capacity, counsel may consider the following factors:

- 1) The child's ability to communicate a preference;
- 2) Whether the child can articulate reasons for the preference;
- 3) The decision making process used by the child to arrive at the decision (e.g., is it logical, is it consistent with previous positions taken by the child, does the child appear to be influenced by others, etc.); and
- 4) Whether the child appears to understand the consequences of the decision.<sup>2</sup>

A child may have the ability to make certain decisions, but not others. For example, a child with diminished capacity may be capable of deciding that he or she would like to have visits with a sibling, but not be capable of deciding whether he or she should return home or remain with relatives on a permanent basis. The lawyer should continue to assess the child's capacity as it may change over time.

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<sup>2</sup> See, *Report of the Working Group on Determining the Child's Capacity to Make Decisions*, 64 *Fordham Law Review* 1339 (1996).

- C. When it is not reasonably possible to maintain a normal lawyer-client relationship generally or with regard to a particular issue, the child’s lawyer should conduct a thorough investigation and then determine what course of action is most consistent with protecting the child in the particular situation and represent the child in accordance with that determination. This determination should be based on objective facts and information and not the lawyer’s personal philosophy or opinion.**

Action:

Where the child client is incapable of directing the lawyer, the lawyer must thoroughly investigate the child’s circumstances, including important family relationships, the child’s strengths and needs, and other relevant information and then determine what actions will protect the child’s interests in safety and permanency.

Action:

In determining what course of action to take when the child cannot provide direction, the lawyer must take into consideration the child’s legal interests based on objective criteria as set forth in the laws applicable to the proceeding, the goal of expeditious resolution of the case and the use of the least restrictive or detrimental alternatives available.

Commentary:

If the child is able to verbalize a preference but is not capable of making an adequately considered decision, the child’s verbal expressions are an important factor to consider in determining what course of action to take. The child’s needs and interests, not the adults’ or professionals’ interests, must be the center of all advocacy. The child’s lawyer should seek out opportunities to observe and interact with the very young child client. It is also essential that lawyers for very young children have a firm working knowledge of child development and special entitlements for children under age five.

The child’s lawyer may wish to seek guidance from appropriate professionals and others with knowledge of the child, including the advice of an expert.

- D. When the lawyer reasonably believes the child has diminished capacity, is at risk of substantial physical, sexual, psychological or financial harm, and cannot adequately act in his or her own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client.**

Action:

When a child with diminished capacity is unable to protect him or herself from substantial harm, ORPC 1.14 allows the lawyer to take action to protect the client. Oregon Rule of Professional Responsibility 1.6(a) implicitly authorizes a lawyer to reveal information about the child, but only to the extent reasonably necessary to protect the child's interests.<sup>3</sup> Information relating to the representation of a child with diminished capacity is protected by Rule 1.6 and Rule 1.14 of the Oregon Rules of Professional Conduct.

Action:

The lawyer should choose the protective action that intrudes the least on the lawyer-client relationship and is as consistent as possible with the wishes and values of the child.

Action:

In extreme cases, i.e., where the child is at risk of substantial physical harm and cannot act in his or her own interest and where the child's lawyer has exhausted all other protective action remedies, the child's lawyer may request the court to appoint a best-interest advocate such as a CASA to make an independent recommendation to the court with respect to the best interests of the child.

Action:

When a child has been injured or suffers from a disability or congenital condition that results in the child having a progressive illness that will be fatal and is in an advanced stage, is in a coma or persistent vegetative state, or is suffering brain death, State ex rel. Juvenile Dept. of Multnomah County v. Smith<sup>4</sup>, provides that the lawyer for the child should consult with the parent if appropriate and consider seeking appointment of a guardian ad litem under the juvenile and probate code in a consolidated case with the authority to consent to medical care, including the provision or withdrawal of life sustaining medical treatment pursuant to ORS 127.505 et seq.

Commentary:

This standard implements paragraph (b) of ORPC 1.14, which states the generally applicable rule that when a client has diminished capacity and the lawyer believes the client is at risk of substantial harm, the lawyer may take certain steps to protect the client, such as consulting with family members or protective agencies and, if necessary,

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<sup>3</sup> ORPC 1.14(c).

<sup>4</sup> 205 Or. App. 152, 133 P3d 924 (2006)



requesting the appointment of a guardian ad litem. In addition, the commentary to the Rule notes that if a guardian is not appointed, “the lawyer often must act as de facto guardian.”

Substantial harm includes physical, sexual, financial and psychological harm. Protective action includes consultation with family members or professionals who work with the child. Lawyers may also utilize a period of reconsideration to allow for an improvement or clarification of circumstances or to allow for an improvement in the child’s capacity.

Ordinarily, under ORPC 1.6, unless authorized to do so, a child’s lawyer may not disclose information related to representation of the child. When taking protective action pursuant to this section, the lawyer is impliedly authorized to make necessary disclosures, even when the client directs the lawyer to the contrary. However, the lawyer should make every effort to avoid disclosures if at all possible. Where disclosures are unavoidable, the lawyer must limit the disclosures as much as possible. Prior to any consultation, the lawyer should consider the impact on the client’s position and whether the individual is a party who might use the information to further his or her own interests. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client’s interests before discussing matters related to the client. If any disclosure by the lawyer will have a negative impact on the client’s case or the lawyer-client relationship, the lawyer must consider whether representation can continue and whether the lawyer-client relationship can be re-established.

Requesting the judge to appoint a CASA or other best interest advocate may undermine the relationship the lawyer has established with the child. It also potentially compromises confidential information the child may have revealed to the lawyer. The lawyer cannot ever become the best interest advocate, in part due to confidential information that the lawyer receives in the course of representation. Nothing in this section restricts a court from independently appointing a best interest advocate when it deems the appointment appropriate.

- E. The child’s lawyer should not advise the court of the lawyer’s determination of the child’s capacity, and, if asked, should reply that the lawyer’s relationship with the client is privileged.**

Commentary:

The lawyer’s assessment of a child client’s capacity to direct the case is a confidential matter that goes to the heart of the lawyer-client relationship. Even though sometimes judges want to know whether the lawyer is acting at the client’s direction or is making a substituted judgment, the lawyer should not provide this information, since

doing so fundamentally undermines the lawyer's ability to be an effective advocate for the child.

## **STANDARD 2 - RELATIONSHIP WITH THE CHILD CLIENT**

- A. The child's lawyer should insure that the child is aware that he or she has a lawyer and communicate with the child before all court appearances, case status conferences, pretrial conferences and mediations, and any important decision affecting the child's life, and following (and, when possible, before) significant transitions including, but not limited to, initial removal and changes in placement.**

### Action:

The child's lawyer must meet with the child within 72 hours of counsel's appointment. During the first meeting with the child, the lawyer must explain his or her role to the client.

### Action:

The child's lawyer should meet or communicate with a child client immediately after becoming informed of a change in the child's placement if not beforehand.

### Action:

A child's lawyer must have contact with the client before court hearings and Citizen Review Board (CRB) reviews, in response to contact by the client, when a significant change of circumstances must be discussed with the client or when a lawyer learns of emergencies or significant events affecting the child.

### Action:

A child's lawyer must communicate with the child at least quarterly. Counsel must determine whether developing and maintaining a lawyer-client relationship requires that the meetings occur in person in the child's environment or whether other forms of communication, such as a telephone or email conversation are sufficient.

### Commentary:

Establishing and maintaining a relationship with the child client is the foundation of representation. It is often more difficult to develop a relationship and trust with a child client than with an adult. Meeting with the child personally and regularly allows the lawyer to develop a relationship with the client and to assess the child's circumstances. The child's position, interests, needs and wishes change over time. A lawyer for a child

cannot be fully informed of such changes without developing a relationship through frequent contacts.

In order to provide competent representation, the lawyer for a child should initially meet with the child in the child's environment to understand the child's personal context, unless the client indicates that he or she does not want the lawyer to do this. The benefits of meeting with an older child who can convey information and express his or her wishes are obvious. However, meeting with younger children, including preverbal children, is equally important. ORPC 1.14 recognizes the value of the child client's input and further recognizes that varying degrees of input from children at different developmental stages may occur. In addition, preverbal children can provide valuable information about their needs through their behavior, including their interactions with their caretakers and other children or adults.

The child's lawyer must communicate with a child client at least quarterly. The extraordinary circumstances under which counsel may have contact with a child client less than quarterly include situations where the child is "on the run" and his or her whereabouts are unknown, there is strong evidence that the child will be adversely affected by communicating with counsel or the child refuses to communicate with counsel.

**B. The child's lawyer should provide the child with contact information in writing and establish an effective system for the child to communicate with the lawyer.**

Action:

The child's lawyer should ensure the child understands how to contact the lawyer and that the lawyer wants to hear from the client on an ongoing basis. The lawyer should explain that even when the lawyer is unavailable, the child should leave a message.

Action:

The lawyer must respond to client messages in a reasonable time period.

Commentary:

It is important that the child's lawyer, from the beginning of the case, is clear with the child that the lawyer works for the child, is available for consultation and wants to communicate regularly. This will help the lawyer support the client, gather information for the case and learn of any difficulties the child is experiencing that the lawyer might help address. The lawyer should explain to the client the benefits of bringing issues to the lawyer's attention rather than letting problems persist.

Communicating with child clients and other parties by email may be the most effective means of maintaining regular contact. However, lawyers should also understand the pitfalls associated with communicating sensitive case history and material by email. Not only can email create greater misunderstanding and misinterpretation, it can also become documentary evidence in later proceedings. The lawyer should treat this form of communication as not confidential and advise the client accordingly.

- C. The child’s lawyer should communicate with the child in a developmentally and culturally appropriate manner. An interpreter should be retained when the lawyer and child are not fluent in the same language.**

Action:

The lawyer must explain to the child in a developmentally appropriate way all information that will assist the child in having maximum input in determining his or her position. Interviews should be conducted in private.

Action:

The lawyer must be aware of the child’s cultural background and how that background affects effective communication with the child.

Action:

The lawyer must explain the result of all court hearings and administrative proceedings to the client in a manner appropriate, given the child’s age, abilities, cultural background and wish to be informed.

Action:

The lawyer should ensure a qualified interpreter is involved when the lawyer and client are not fluent in the same language.

Commentary:

A child’s lawyer must be adept at giving explanations, asking developmentally and culturally appropriate questions and interpreting the child’s responses in such a manner as to obtain a clear understanding of the child’s preferences. This process can and will change based on age, cognitive ability and emotional maturity of the child. The lawyer needs to take the time to explain thoroughly and in a way that allows and encourages the child to ask questions and that ensures the child’s understanding.

In addition to communicating with the child client, the lawyer should review records and consult with appropriate professionals and others with knowledge of the child. The lawyer also may find it helpful to observe the child's interactions with foster parents, birth parents and other significant individuals. This information will help counsel to better understand the child's perspective, priorities and individual needs, and will assist the child's lawyer identifying relevant questions to pose to the child.

The lawyer should advocate for the use of an interpreter when other professionals in the case who are not fluent in the same language as the client are interviewing the client. The lawyer should become familiar with interpreter services that are available for out-of-court activities such as client conferences, provider meetings, etc.

**D. The child's lawyer should show respect to the client and act professionally with the child.**

Action:

A child's lawyer should support his or her client and be sensitive to the client's individual needs. Lawyers should remember that they may be their clients' only advocate in the system and should act accordingly.

Commentary:

Often lawyers practicing in abuse and neglect court are a close-knit group who work and sometimes socialize together. Maintaining good working relationships with other players in the child welfare system is an important part of being an effective advocate. The lawyer, however, should be vigilant against allowing the lawyer's own interests in relationships with others in the system to interfere with the lawyer's primary responsibility to the client. The lawyers should not give the impression to the client that relationships with other lawyers are more important than the representation the lawyer is providing the client. The client must feel that the lawyer believes in him or her and is actively advocating on the client's behalf.

**E. The child's lawyer should understand confidentiality laws, as well as ethical obligations, and adhere to both with respect to information obtained from or about the client.**

Action:

The lawyer must fully explain to the client the advantages and disadvantages of choosing to exercise, partially waive or waive a privilege or right to confidentiality. If the lawyer for a child determines that the child is unable to make an adequately considered decision with respect to waiver, the lawyer must act with respect to waiver in a manner consistent with and in furtherance of the client's position in the overall litigation.

Action:

Consistent with the client's interests and goals, the lawyer must seek to protect from disclosure confidential information concerning the client.

Action:

A lawyer should try to avoid publicity connected with the case that is adverse to the client's interests. A lawyer should be cognizant of the emotional nature of these cases, the confidential nature of the proceedings and the privacy needs of the client. A lawyer should protect the client's privacy interests, including asking for closed proceedings when appropriate.

- F. The child's lawyer should be alert to and avoid potential conflicts of interest, or the appearance of a conflict of interest, that would interfere with the competent representation of the client.**

Action:

A lawyer or a lawyer associated in practice, should not represent two or more clients who are parties to the same or consolidated juvenile dependency cases or closely related matters unless it is clear there is no conflict of interest between the parties as defined by the Oregon Rules of Professional Conduct (ORPC). Lawyers should also follow ORPC 1.8–1.13 relating to conflicts of interests and duties to former clients.

Commentary:

A lawyer should be especially cautious when accepting representation of more than one child. A lawyer should avoid representing multiple siblings when their interests may be adverse and should never represent siblings when it is alleged that one sibling has physically or sexually abused another sibling.

In analyzing whether a conflict of interest exists, the lawyer must consider whether pursuing one client's objectives will prevent the lawyer from pursuing another client's objectives, and whether confidentiality may be compromised. Conflicts of interest among siblings are likely if one child is allegedly a victim and the other(s) are not, if an older child is capable of directly the representation but a younger child is not, or if older children object to the permanency plan for younger children.

Child clients may not be capable of consenting to multiple representations even after full disclosure. For a child client not capable of considered judgment or unable to execute any written consent to continued representation in a case of waivable conflict of interest, the lawyer should not represent multiple parties.

**G. The child’s lawyer should advocate for actions necessary to meet the client’s educational, health and mental health needs.**

Action:

Consistent with the child's wishes, the child's lawyer should identify the child’s needs and seek appropriate services (by court order if necessary) to access entitlements, to protect the child's interests and to implement an individualized service plan. These services should be culturally competent, community-based whenever possible and provided in the least restrictive setting appropriate to the child’s needs. These services may include, but are not limited to:

- 1) Family preservation-related prevention or reunification services;
- 2) Sibling and family visitation;
- 3) Domestic violence services, including treatment;
- 4) Medical and mental health care;
- 5) Drug and alcohol treatment;
- 6) Educational services;
- 7) Recreational or social services;
- 8) Housing;
- 9) Semi-independent and independent living services for youth who are transitioning out of care and services to help them identify and link with permanent family connections; and
- 10) Adoption services.

Action:

Consistent with the child's wishes, the child's lawyer should assure that a child with special needs receives the appropriate and least restrictive services to address any physical, mental or developmental disabilities. These services may include, but should not be limited to:

- 1) Special education and related services;
- 2) Supplemental security income (SSI) to help support needed services;
- 3) In home, community based behavioral health treatment or out-patient psychiatric treatment;
- 4) Therapeutic foster or group home care; and
- 5) Residential/in-patient behavioral health treatment.

**H. The child’s lawyer should report abuse or neglect discovered through lawyer-client communication only if the child consents to the disclosure.**

Commentary:

Under ORS 419B.010, lawyers are mandatory child abuse reporters. However, a lawyer is not required to report if the information that forms the basis for the report is privileged. Further, ORS 419B.010(1), “A lawyer is not required to make a report under this section by reason of information communicated to the lawyer in the course of representing a client if disclosure of the information would be detrimental to the client.” Lawyers should consult with the lawyer advisors at the Oregon State Bar when they face a close question under these rules.

**I. The child’s lawyer should consider expanding the scope of representation.**

Action:

If a lawyer, in the course of representation of a client under the age of 18, becomes aware that the client has a possible claim for damages that the client cannot pursue because of his or her civil disability, the lawyer should consider asking the court that has jurisdiction over the child to either appoint a guardian ad litem for the child to investigate and take action on the possible claim or issue an order permitting access to juvenile court records by a practitioner who can advise the court whether to seek appointment of a guardian ad litem to pursue a possible claim.

Action:

The child’s lawyer may pursue, personally or through a referral to an appropriate specialist, issues on behalf of the child, administratively or judicially, even if those issues do not specifically arise from the court appointment. Examples include:

- 1) Delinquency or status offender matters;
- 2) SSI and other public benefits;
- 3) Custody;
- 4) Paternity;
- 5) School and education issues;
- 6) Immigration issues;
- 7) Proceedings related to the securing of needed health and mental health services;  
and
- 8) Child support.

Commentary:

The child’s lawyer may request authority from the appropriate authority to pursue issues on behalf of the child, administratively or judicially, even if those issues do not specifically arise from the court appointment. Such ancillary matters may include special education, school discipline hearings, mental health treatment, delinquency or criminal



issues, status offender matters, paternity, probate, immigration matters, medical care coverage, SSI eligibility, youth transitioning out of care issues, postsecondary education opportunity qualification and tort actions for injury.

The child's lawyer does not have an ethical duty to represent the child in these collateral matters where the terms of the lawyer's employment limit duties to the dependency case. However, the lawyer may have a duty to take limited steps to protect the child's rights, ordinarily by notifying the child's legal custodian about the possible claim unless the alleged tortfeasor is the legal custodian. In the latter case, ordinarily the lawyer adequately protects the child by notifying the court about the potential claim. Whether this solution will work depends on whether a lawyer capable of assessing the potential tort claim is available to be appointed by the court. In Multnomah County, at the request of the juvenile court judges, the Oregon Trial Lawyers Association has created a panel that accepts referrals under these circumstances. In other counties, a juvenile court judge might well expect the child's lawyer to recommend someone to whom the case could be referred. In this situation, the child's lawyer should research the other lawyer's reputation and communicate clearly to the court and to the child that he or she is turning the work over to the receiving lawyer and is not vouching for the receiving lawyer's work or monitoring his progress in pursuing the claim. For more information, see [Oregon Child Advocacy Project, When a Child May Have a Tort Claim: What's a Child's Court-Appointed Attorney to Do? \(2010\)](#).

### **STANDARD 3 - TRAINING REQUIREMENTS FOR COMPETENT REPRESENTATION OF CHILDREN**

- A. A lawyer must provide competent representation to a child client. Competent representation requires the legal knowledge, skill, training, experience, thoroughness and preparation reasonably necessary for the representation. A lawyer should only accept an appointment or retainer if the lawyer is able to provide quality representation and diligent advocacy for the client.**

**Action:**

A lawyer representing a child in a dependency case should obtain and maintain proficiency in applicable substantive and procedural law and stay current with changes in constitutional, statutory and evidentiary law and local or statewide court rules.

**Action:**

A lawyer representing a child in a dependency case should have adequate time and resources to competently represent the client, including maintaining a reasonable caseload and having access to sufficient support services.

- B. Before accepting an appointment or retainer on a child dependency or termination of parental rights case, the lawyer should gain experience by observing and serving as co-counsel in dependency and termination of parental rights cases. The lawyer accepting appointment or retainers to represent children in dependency and termination of parental rights cases should participate in at least 16 hours of continuing legal education (CLE) related to juvenile law each year.**

Action:

A lawyer representing a child in a dependency case must have served as counsel or co-counsel in at least two dependency cases adjudicated before a judge or have observed at least five dependency cases adjudicated before a judge.

Action:

A lawyer representing a parent in a termination-of-parental-rights cases must have served as counsel or co-counsel in or observed dependency cases as described above and have served as counsel or co-counsel in at least two termination of parental rights trials; or have observed or reviewed the transcripts of at least two termination of parental rights trials.

Commentary:

As in all areas of law, it is essential that lawyers learn the substantive law as well as local practice. Lawyers should be familiar with the Qualification Standards for Court-Appointed Counsel, Office of Public Defense Services, Standard 4(7). Lawyers should consider the contractually-mandated training requirements as a floor rather than a ceiling and actively pursue additional training opportunities. Newer lawyers are encouraged to work with mentors for the first three months and, at a minimum, should observe or co-counsel each type of dependency hearing from shelter care through review of permanent plan before accepting appointments.

- C. A child's lawyer should acquire working knowledge of all relevant state and federal laws, regulations, policies and rules.**

Action:

A child's lawyer must read and understand all state laws, policies and procedures regarding child abuse and neglect, including but not limited to the following:

- 1) Oregon Revised Statutes chapters 419A and 419B, Oregon Juvenile Code;
- 2) Oregon Revised Statutes chapter 418, Child Welfare Services;
- 3) Refugee Child Act, ORS 418.925–418.945;
- 4) Oregon Revised Statutes concerning paternity, guardianships and adoption;
- 5) Interstate Compact on Placement of Children, ORS 417.200-417.260 and OAR;
- 6) Uniform Child Custody Jurisdiction and Enforcement Act, ORS 109.701-109.834 and OAR;
- 7) The basic structure and functioning of DHS and the juvenile court, including court procedures, the functioning of the citizen review board (hereinafter referred to as CRB) and court-appointed special advocates (hereinafter referred to as CASA) programs; and
- 8) Indian Child Welfare Act 25 USC §1901 -1963; BIA Guidelines; and OAR.

Action:

A child’s lawyer must be thoroughly familiar with Oregon evidence law and the Oregon Rules of Professional Conduct.

Action:

A child’s lawyer must be sufficiently familiar with the areas of state and federal law listed in Appendix A so as to be able to recognize when they are relevant to a case and he or she should be prepared to research these and other applicable issues.

**D. A child’s lawyer should have a working knowledge of child development, family dynamics, placement alternatives case and permanency planning, and services for children and families in dependency cases.**

Action:

A lawyer for children should become familiar with normal growth and development in children and adolescents as well as common types of condition and impairments.

Action:

A lawyer for children should be familiar with the range of placement options in dependency cases and should visit at least two of the following:

- 1) A shelter home or facility;
- 2) A foster home;
- 3) A group home;
- 4) A residential treatment facility;
- 5) The Oregon State Hospital Child or Adolescent Psychiatric Ward; or
- 6) An outpatient treatment facility for children.

Action:

The child's lawyer must be familiar with case planning and permanency planning principles, and with child welfare and family preservation services available through Department of Human Services and available in the community and the problems they are designed to address. A child's lawyer is encouraged to seek training in the areas listed in Appendix B.

Commentary:

The parent's lawyer should know the kinds and types of services within their communities which serve parents and children. Based on the conditions and circumstances which brought the parent and their children into the dependency system, the parent's lawyer should identify the services which will help remove the barriers to reunify the parent and their child(ren). The parent's lawyer should consult with the client about such services and whether the services address the client's needs. The parent's lawyer must be aware of cultural issues within the parent's community and be prepared in appropriate circumstances, to advocate services be made available to a parent that are culturally appropriate and meet the client's unique conditions and circumstances.

#### **STANDARD 4 - GENERAL PRINCIPLES GOVERNING CONDUCT OF THE CASE**

- A. A child's lawyer should actively represent a child in the preparation of a case, as well as at hearings.**

Action:

A child's lawyer should develop a theory and strategy of the case to implement at hearings, including the development of factual and legal issues.

Action:

A child's lawyer should advocate for the child both in and out of court.

Action:

A child's lawyer should inform other parties and their representatives that he or she is representing the child and expects reasonable notification prior to case conferences, changes of placement and other changes of circumstances affecting the child and the child's family. When necessary, the child's lawyer should also remind parties and their representatives that the child has a lawyer and, therefore, they should not communicate with the child without the lawyer's permission.

Commentary:

Regardless of any alignment of position among the child and other parties, the child's counsel should develop his or her own theory and strategy of the case and ensure that the child has an independent voice in the proceeding. The child's counsel should not be merely a fact finder, but rather should zealously advocate a position on behalf of the child. Although the child's position may overlap with the position of one or both parents, third-party caretakers or DHS, child's counsel should be prepared to present his or her client's position independently and to participate fully in any proceedings.

**B. When consistent with the child's interest, the child's lawyer should take every appropriate step to expedite the proceedings.**

Commentary:

Delaying a case often increases the time a family is separated and can reduce the likelihood of reunification. Appearing in court often motivates parties to comply with orders and cooperate with services. When a judge actively monitors a case, services are often put in place more quickly, visitation may be increased or other requests by the parent may be granted. If a hearing is continued and the case is delayed, the parent may lose momentum in addressing the issues that led to the child's removal or the parent may lose the opportunity to prove compliance with case plan goals. Additionally, the Adoption and Safe Families Act (ASFA) timelines continue to run despite continuances.

**C. The child's lawyer should cooperate and communicate regularly with other professionals in the case.**

Action:

The child's lawyer should communicate with lawyers for the other parties, the court appointed special advocates (CASA), the caseworker, foster parents and service providers to learn about the client's progress and their views of the case, as appropriate.

Action:

The child's lawyer should respond promptly to inquiries from other parties and their representatives.

Commentary:

The child's lawyer must have all relevant information to represent a child client effectively. This requires open and ongoing communication with the other lawyers and service providers working with the child and family. When communicating with other parties, service providers and lawyers, the child's lawyer should be especially mindful of confidentiality requirements.

**D. They child's lawyer or the lawyer's agency must not contact represented parties without the consent of their lawyer.**

Commentary:

Before visiting a child who is in the physical custody of his or her parent(s), a child's lawyer must seek permission from the lawyer(s) for the parent(s). Such a visit may present particular difficulties for the child's lawyer since the parents may want to talk to the lawyer about the case. The child's lawyer should be careful not to disclose confidential information or to elicit any information from the parent. If the parent volunteers information, or if the child's lawyer observes something during the visit that is relevant to the case, the lawyer should take protective action for the child as necessary and as agreed to by the child client. The child's lawyer should also, as a matter of courtesy, tell the parent's lawyer about what was seen or disclosed.

When an agency is represented by counsel, the child's lawyer should not talk with a caseworker without the lawyer's permission. However, in many cases, the agency has not retained the Department of Justice to represent it, and in those cases the child's lawyer may talk to caseworkers without permission. If the child's lawyer is unsure whether the DOJ has been retained in a particular case, the lawyer should ask the caseworker.

In some counties, the District Attorney may appear representing the state. The DA is not counsel for the agency in these cases.

**E. The child's lawyer should engage in case planning and advocate for a permanency plan and social services which will help achieve the child's goals in the case.**

Action:

The lawyer should actively engage in case planning, including attending substantive case meetings, such as planning meetings and case reviews of plans. If the lawyer is unable to attend a meeting the lawyer should send a delegate.

Action:

If the child's goal is reunification with the parent, the child's lawyer should advocate for the parent to receive needed services. If the child's goal is not reunification, but the child's lawyer concludes that the parent will be given an opportunity to attempt reunification, the lawyer should advocate for services in support of that effort.

Action:

The child's lawyer should advocate for the child to receive any needed services in which the child is willing to participate.

Action:

After investigation and consultation with the child, the child's lawyer should advocate for the child's placement with his or her preferred care provider, if any, and in the least restrictive, culturally appropriate and most familiar setting possible.

Action:

Whenever possible, the child's lawyer should use a social worker as part of the child's team to help determine an appropriate case plan, evaluate suggested social services, and act as a liaison and advocate for the client with the service providers where appropriate.

Commentary:

When the child wishes to be reunited with the parent, the child's lawyer should advocate for services for the parent and child that will facilitate reunification. If the child does not want to return to the parent, but the child's lawyer concludes that reunification will be the initial case plan, the child's lawyer should also advocate for appropriate services to the parent, since failure to provide necessary services is likely simply to delay the case.

The lawyer should ensure that the child's plan for permanency addresses not only the permanency goal but also the child's developmental, medical, emotional, educational and independent living. Permanency includes minimizing the child's disruptions during his/her time in care and ensuring trauma-informed treatment, decision-making and transition planning.

Depending on the age and maturity of the child client, the child may have a preference placement or have an existing relationship with a relative or adult friend that can be certified as a placement for the child. The child's lawyer should advocate for the child's preferred placement and ensure the Department fully explores placements suggested by the child client.

**F. If the child's goal is reunification with the parent, the child's lawyer should advocate strongly for frequent visitation in a family-friendly setting.**

Action:

When necessary, the child's lawyer should seek court orders to compel the child welfare agency to provide frequent, unsupervised visitation if safe for the child. The lawyer may also need to take action to enforce previously entered orders.

Action:

The child's lawyer should advocate for an effective visiting plan consistent with the child's wishes. Factors to consider in visitation plans include:

- 1) Developmental age of child;
- 2) Frequency;
- 3) Length;
- 4) Location;
- 5) Child's safety;
- 6) Types of activities; and
- 7) Visit coaching - having someone at the visit who could model effective parenting skills.

Commentary:

Frequent high quality visitation is one of the best predictors of successful reunification between a parent and child. Often visits are arranged in settings that are uncomfortable and inhibiting for families. It is important that the child's lawyer seek a visitation order that will allow the best possible visitation. The lawyer should advocate that visits be unsupervised if safe for the child or at the lowest safe level of supervision, e.g. families often are more comfortable when relatives, family friends, clergy or other community members are recruited to supervise visits rather than caseworkers.

Lawyers should advocate for visits to occur in family-friendly locations, such as in the family's home, parks, libraries, restaurants, place of worship or other community venues and at the child's activities.



## **STANDARD 5 - INVESTIGATION**

- A. A child's lawyer should conduct a thorough, continuing and independent review and investigation of the case, including obtaining information, research and discovery in order to prepare the case for trial.**

**Action:**

A lawyer should not rely solely on the disclosure information provided by the DHS caseworker, the state or other parties as the investigation of the facts and circumstances underlying the case.

**Action:**

The child's lawyer should review the record of case of the child (formerly the legal file) and the supplemental confidential file and, if available, the record of the case of the child's siblings.

**Action:**

The child's lawyer should contact lawyers for the other parties and court-appointed special advocates (CASAs) for background information.

**Action:**

The child's lawyer should contact and meet with the parents/legal guardians/caretakers of the child with permission of their lawyer.

**Action:**

The lawyer should obtain necessary releases of information in order to thoroughly investigate the case.

**Action:**

The lawyer should interview individuals involved with the child.

**Action:**

The lawyer should review relevant photographs, video or audio tapes and other evidence. When necessary, the lawyer should obtain protective orders to obtain access to such evidence.

Action:

A lawyer should research and review relevant statutes and case law to identify defenses and legal arguments to support the child's case.

Commentary:

In conducting the investigation and utilizing its results to formulate a legal course of action on behalf of a child, lawyers must also utilize that information to understand the child in a larger context as a multidimensional being. The lawyer must become familiar with his or her client's world, maintain an open mind regarding his or her client's differences and ensure objective assessment of the child's circumstances, desires and needs in the context of the child's connection to family, culture and community. To achieve the child's individualized goals for the legal proceeding, within the bounds of confidentiality, the lawyer should encourage, when advantageous to the child, the involvement of family and community resources to resolve the issues the child and family face. The lawyer should be familiar with procedures to obtain funds for evaluation or assessment of the client.

Action:

The child's lawyer should work with a team that includes investigators and social workers to prepare the child's case. If necessary, the lawyer should petition the OPDS for funds.

Commentary:

If possible, the child's lawyer should work with a team that includes social workers and investigators who can meet with the child and assist in investigating the underlying issues that arise as cases proceed. If not possible, the lawyer is still responsible for gaining all pertinent case information, being mindful of not making himself a witness.

**B. The child's lawyer should review the child welfare agency case file.**

Action:

The child's lawyer should ask for and review the agency case file as early during the course of representation as possible and at regular intervals throughout the case.

Action:

After a review of the agency file, the lawyer should determine if any records or case notes of any social worker or supervisor have not been placed in the file and move to obtain those records as well either through informal or formal discovery.

Commentary:

Even if the lawyer is voluntarily given contents of the DHS file in paper or electronic format, the lawyer should also look at the actual file in the DHS office and request disclosure of all documents relating to the case from DHS, since the department may have additional items not given to the lawyer. If requests to obtain copies of the agency file are unsuccessful or slow in coming, the lawyer should pursue formal disclosure in a timely fashion. If the agency case file is inaccurate, the lawyer should seek to correct it. The lawyer must read the case file and request disclosure of documents periodically because information is continually being received by the agency.

- C. The child's lawyer should obtain all necessary documents, including copies of all pleadings and relevant notices filed by other parties, and respond to requests for documents from other parties.**

Action:

A lawyer should comply with disclosure statutes and use the same to obtain names and addresses of witnesses, witness statements, results of evaluations or other information relevant to the case. A lawyer should obtain and examine all available discoveries and other relevant information.

Commentary:

As part of the discovery phase, the lawyer should review the following kinds of documents:

- 1) Social service records, including information about services provided in the past, visitation arrangements, the plan for reunification and current and planned services;
- 2) Medical records;
- 3) School records;
- 4) Evaluations of all types;
- 5) Housing records; and
- 6) Employment records

- D. A child's lawyer should have potential witnesses, including adverse witnesses interviewed and, when appropriate, subpoenaed by an investigator or other appropriately trained person.**

Action:

Potential witnesses to be interviewed may include:

- 1) School personnel;
- 2) Neighbors;
- 3) Relatives;
- 4) Caseworkers;
- 5) Foster parents and other caretakers;
- 6) Mental health professionals;
- 7) Physicians;
- 8) Law enforcement personnel; and
- 9) The child(ren).

Commentary:

It is usually good practice to have interviews conducted by an investigator employed by the lawyer but if the lawyer conducts the interview, a third person such as a member of the lawyer's office should be present so that, if necessary, the third person can be used at trial or hearing as a witness.

Action:

When appropriate, a lawyer or another trained and qualified person should observe visitations between the parent and child.

## **STANDARD 6 - COURT PREPARATION**

- A. The child's lawyer should develop a case theory and strategy to follow at hearings and negotiations.**

Action:

Once the child's lawyer has completed the initial investigation and discovery, including interviews with the client, the lawyer should develop a strategy for representation.

Commentary:

The strategy may change throughout the case, as the child or parent makes or does not make progress, but the initial theory is important to assist the lawyer in staying focused on the client's wishes and on what is achievable. The theory of the case should inform the lawyer's preparation for hearings and arguments to the court. It should also

be used to identify what evidence is needed for hearings and the steps to move the case toward the client's ultimate goals.

**B. The child's lawyer should timely file all pleadings, motions, objections and briefs and research applicable legal issues and advance legal arguments when appropriate.**

Action:

The lawyer must file answers and responses, motions, objections and discovery requests that are appropriate for the case. The pleadings must be thorough, accurate and timely. The pleadings must be served on the lawyers or unrepresented parties.

Action:

When a case presents a complicated or new legal issue, the child's lawyer should conduct the appropriate research before appearing in court. The lawyer should be prepared to distinguish case law that appears unfavorable.

Action:

If it would advance the client's case, the child's lawyer should present a memorandum of law to the court.

Commentary:

Filing motions, pleadings and briefs benefits the client. This practice highlights important issues for the court and builds credibility for the lawyer. In addition to filing responsive papers and discovery requests, the lawyer should seek court orders when that would benefit the client, e.g., filing a motion to enforce court orders to ensure the child welfare agency is meeting its reasonable efforts obligations. When out-of-court advocacy is not successful, the lawyer should not wait to bring the issue to the court's attention. Arguments in child welfare cases are often fact-based. Nonetheless, lawyers should ground their argument in statutory, Oregon Administrative Rules (OARs) and case law. Additionally, while non-binding, law from other jurisdictions can be used to persuade a court.

At times, competent representation requires advancing legal arguments that are not yet accepted in the jurisdiction. Lawyers should preserve legal issues for appellate review by making a record, even if the argument is unlikely to prevail at trial level.

Appropriate pretrial motions include but are not limited to:

- 1) Discovery motions;
- 2) Motions challenging the constitutionality of statutes and practices;
- 3) Motions to strike, dismiss or amend the petitions;
- 4) Motions to transfer a case to another county;
- 5) Evidentiary motions and motions in limine;
- 6) Motions for additional shelter hearings;
- 7) Motions for change of venue;
- 8) Motion to consolidate; and
- 9) Motion to sever.

Note: Under ORS 28.110 when a motion challenges the constitutionality of a statute, it must be served on the Attorney General.

Action:

A lawyer should make motions to meet the client's needs pending trial.

Commentary:

Examples of such motions include:

- 1) Motion for family reunification services;
- 2) Motion for medical or mental health treatment;
- 3) Motion for change of placement;
- 4) Motion to increase parental or sibling visitation;
- 5) Motion seeking contempt for violations of court orders; and
- 6) Motion to establish, disestablish or challenge paternity pursuant to chapter 419B.

**C. The child's lawyer should promote and participate in settlement negotiations and mediation to resolve the case quickly.**

Action:

The child's lawyer should, when appropriate, participate in settlement negotiations to promptly resolve the case, keeping in mind the effect of continuances and delays on the child's goals.

Commentary:

The child's lawyer should use suitable mediation resources. The child's lawyer should consult the child in a developmentally appropriate way prior to any settlement becoming binding. The ultimate settlement agreement must be consistent with the child's wishes.

The facts to which the parties admit will frame the court's inquiry at all subsequent hearings as well as what actions the parties must take, the services provided and the ultimate outcome.

A written, enforceable agreement should be prepared whenever possible, so that all parties are clear about their rights and obligations. The child's lawyer should ensure agreements accurately reflect the understandings of the parties. The child's lawyer should request a hearing or move for contempt, if appropriate, if orders benefiting the child are not obeyed.

- D. Explain to the child, in a developmentally-appropriate manner, what is expected to happen before, during and after each hearing and facilitate the child's attendance at hearings when appropriate.**

Action:

Prior to a hearing, the child's lawyer should discuss with the child its purpose, what is likely to happen during it and whether the child will attend.

Commentary:

Children over the age of 12 must be served by summons under ORS 419B.839(c). If the child is not properly served with the summons, the child's lawyer should consider whether a motion to dismiss is appropriate. If the child will attend the hearing, the child's lawyer should meet with the child to explain what will happen at the hearing and to prepare for it.

The lawyer for a child younger than 12 years of age, and in some cases for a child older than 12, should determine, through consultation with the client and the child's therapist, caretaker or other knowledgeable person(s), how the child is likely to be affected by attending a hearing. If the child's lawyer concludes that attendance might be detrimental to the child, the lawyer should meet with the child to discuss this concern. The discussion should include how best to minimize the potential detrimental effects on the child. Whether to attend the hearing is a decision for the child provided the child is able to direct the lawyer on this issue.

Action:

When the child wishes to attend the proceedings, the child's lawyer must request that DHS, as the child's legal custodian, transport the child to the hearing.

Action:

When appropriate, the child's lawyer should ask that DHS provide support for the child to minimize adverse impacts of the hearing on the child.

Commentary:

The child's lawyer should ask DHS to provide necessary support for the child during the hearing. One example of such support is requesting that DHS have personnel accompanying the child to and from the hearing who will be able to remain with the child throughout the hearing and during any breaks.

- E. In consultation with the child, the child's lawyer should determine whether to call the child to testify. When the child will offer testimony or will be called by another party, the lawyer should prepare the child to testify.**

Action:

The child's lawyer should decide whether to call the child as a witness, although the lawyer is bound by the wishes of a child capable of considered judgment. The decision should consider the child's need or desire to testify, the necessity of the child's direct testimony, the availability of other evidence or hearsay exceptions which may substitute for direct testimony by the child, the child's developmental ability to provide direct testimony and withstand possible cross-examination, and any repercussions of testifying, including but not limited to the possible emotional and psychological effect of testifying on the child and on the possible reunification of the family.

Action:

The child's lawyer must be familiar with the current law and empirical knowledge about children's competency, memory and suggestibility and, where appropriate, attempt to establish the competency and reliability of the child.

Commentary:

There is no minimum age below which a child is automatically incompetent to testify. To testify as a witness, the child must have the capacity to observe, adequate intelligence, adequate memory, ability to communicate, an awareness of the difference between telling truth and falsehood and understand that she or he must tell the truth as



a witness. The court should make the determination of the child client's competency as a witness under the applicable rules of evidence prior to the child's testimony. If necessary, the child's lawyer should present expert testimony to establish competency or reliability or to rehabilitate any impeachment of the child on those bases.

While testifying is undoubtedly traumatic for many children, it is therapeutic and empowering for others. The child's lawyer should take all reasonable steps to reduce the likelihood of the child being traumatized from testifying. The decision about the child's testifying must be made based on the individual child client's abilities, circumstances and need for the child's testimony. If the child has a therapist, he or she should be consulted both with respect to the decision itself and assistance with preparing the child to testify.

If the child does not wish to testify or would be harmed by being forced to testify, the child's lawyer should seek a stipulation of the parties not to call the child as a witness or file a motion pursuant to ORS 419B.310 to take the testimony of the child outside the presence of the parent(s) and other parties.

Action:

The child's lawyer should prepare the child to testify and seek to minimize any harm that testifying will cause to the child.

Commentary:

Unlike a criminal proceeding or delinquency proceeding, the child can be called as a witness by any other party to the proceeding. Thus, regardless of the child's desire to testify, he or she may be called as a witness by another party to the proceeding. The child's lawyer needs to be aware of the potential that the child will be called as a witness and take steps necessary to prepare the child as a witness.

The child's lawyer's preparation of the child to testify should include attention to the child's developmental needs and abilities, as well as to accommodations which should be made by the court and other lawyers including the necessity of filing a motion pursuant to ORS 419B.310 to take the child's testimony outside the parents' presence.

The child's lawyer should familiarize the child client with the court room and process for testifying including the likelihood that the child's lawyers for the parent or state will also ask questions to reduce potential harm to the child. The lawyer should also prepare the child for the possibility that the judge may render a decision against the child's wishes which will not be the child's fault.

**F. The child’s lawyer should identify, locate and prepare all witnesses.**

Action:

The child’s lawyer, in consultation with the child to the extent developmentally appropriate, should develop a witness list well before a hearing or trial. The child’s lawyer should not assume the agency will call a witness, even if the witness is named on the agency’s witness list. The child’s lawyer should, when possible, contact the potential witnesses to determine if they can provide helpful testimony.

Action:

When appropriate, witnesses should be informed that a subpoena is on its way. The child’s lawyer should also ensure the subpoena is served. The child’s lawyer should subpoena potential agency witnesses (e.g., a previous caseworker) who have favorable information about the client.

Action:

The child’s lawyer should set aside time to fully prepare all witnesses in person before the hearing. The child’s lawyer should remind the witnesses about the court date.

Commentary:

Preparation is the key to successfully resolving a case, either in negotiation or trial. The child’s lawyer should plan as early as possible for the case and make arrangements accordingly. The child’s lawyer should carefully review the other party’s witness lists and be prepared to independently obtain witnesses and evidence in support of child’s position. Witnesses may be people with direct knowledge of the allegations against the parent, service providers working with the parent or individuals from the community who could testify generally about the family’s situation.

When appropriate, the child’s lawyer should consider working with other parties who share the child’s position when developing the child’s witness list, issuing subpoenas and preparing witnesses. Doctors, nurses, teachers, therapists and other potential witnesses have busy schedules and need advance warning about the date and time of the hearing.

The child’s lawyer should prepare their witnesses thoroughly so the witnesses feel comfortable with the process and understand the scope of their testimony. Preparation will generally include rehearsing the specific questions and answers expected on direct and anticipating the questions and answers that might arise on cross-examination. Lawyers should provide written questions for those witnesses who need them.

**G. The child’s lawyer should identify, secure, prepare and qualify expert witnesses when needed. When possible, interview opposing counsel’s experts.**

Action:

Often a case requires multiple experts with different expertise, such as medicine, mental health treatment, drug and alcohol treatment, or social work. Experts may be needed for ongoing case consultation in addition to providing testimony at trial. The lawyer should consider whether the opposing party is calling expert witnesses and determine whether the child needs to call any experts to respond to the opponent’s experts.

Action:

When opposing counsel plans to call expert witnesses, the child’s lawyer should seek to interview the witnesses in advance. Lawyers should scrupulously comply with standing orders of the juvenile court regarding contact with court-ordered evaluators.

Commentary:

By contacting opposing counsel’s expert witnesses in advance, the child’s lawyer will know what evidence will be presented against the client and whether the expert has any favorable information that might be elicited on cross-examination. The lawyer will be able to discuss the issues with the client, prepare a defense and call experts on behalf of the client, if appropriate. Conversely, if the lawyer does not talk to the expert in advance, the lawyer could be surprised by the evidence and unable to represent the client competently.

**STANDARD 7 - HEARINGS**

**A. Prepare for and attend all hearings, including pretrial conferences.**

Action:

The child’s lawyer must prepare for and attend all hearings and participate in all telephone and other conferences with the court. The child’s position may overlap with the positions of one or both parents, third-party caretakers or DHS. Nevertheless, the child’s lawyer should participate fully in every hearing and not merely defer to the other parties. The child’s lawyer should be prepared to state and explain the child’s position at each hearing.

Action:

If the court proceeds in the absence of the lawyer, the lawyer should file a motion to set aside.

Commentary:

The child's lawyer's participation in pretrial proceedings may improve case resolution for the child and failing to participate in the proceedings may harm the child's position in the case. Therefore, the child's lawyer should be actively involved in this stage. If a lawyer has a conflict with another courtroom appearance, the lawyer should notify the court and the other parties and request a short continuance. The parent's lawyer should not have another lawyer stand in to represent the client in court if the other lawyer is unfamiliar with the client or case.

Becoming a strong courtroom lawyer takes practice and attention to detail. The lawyer must be sure to learn the rules about presenting witnesses, impeaching testimony and entering evidence. The lawyer may wish to seek out training in trial skills and watch other lawyers to learn from them. Presenting and cross-examining witnesses are skills with which the child's lawyer must be comfortable.

**B. The child's lawyer should request the opportunity to make opening and closing arguments.**

Action:

The child's lawyer should make opening and closing arguments in the case to frame the issues around the child's lawyer's theory of the case and ensure the judge understands the issues from the child's perspective.

Commentary:

In many child abuse and neglect proceedings, lawyers waive the opportunity to make opening and closing arguments. However, these arguments can help shape the way the judge views the case and therefore can help the client. Argument may be especially critical, for example, in complicated cases when information from expert witnesses should be highlighted for the judge, in hearings that take place over a number of days or when there are several children and the agency is requesting different services or permanency goals for each of them.

It is important to be able to read the judge. The attorney should move along when the judge is tracking the argument and elaborate on the areas that appear to need more attention.

- C. Prepare and make all appropriate motions and evidentiary objections. Be aware of the need to make a record for appeal.**

Action:

The child's lawyer should make appropriate motions and evidentiary objections to advance the child's position during the hearing. If necessary, the child's lawyer should file memoranda of points and authorities in support of the client's position on motions and evidentiary issues. The child's lawyer should always be aware of preserving legal issues for appeal.

Commentary:

It is essential that the child's lawyers understand the applicable rules of evidence and all court rules and procedures. The lawyer must be willing and able to make appropriate motions, objections and arguments (e.g., objecting to the qualification of expert witnesses, the competence of child or other witness, or raising the issue of the child welfare agency's lack of reasonable efforts).

- D. If the child testifies, the child's lawyer should ensure that questions to the child are phrased in a syntactically and linguistically appropriate manner.**

Commentary:

The phrasing of questions should take into consideration the law and research regarding children's testimony, memory and suggestibility. The information a child gives in interviews and during testimony is often misleading because the adults have not understood how to ask children developmentally appropriate questions and how to interpret their answers properly. The child's lawyer must become skilled at recognizing the child's developmental limitations. It may be appropriate to present expert testimony on the issue and even to have an expert present during a young child's testimony to point out any developmentally inappropriate phrasing.

- E. The child's lawyer should present and cross examine witnesses and prepare and offer exhibits.**

Action:

The parents' lawyer must be able to effectively present witnesses to advance the client's position. Witnesses must be prepared in advance and the lawyer should know what evidence will be presented through the witnesses. The lawyer must also be skilled at cross-examining opposing parties' witnesses. The lawyer must know how to offer documents, photos, physical objects, electronic records, etc. into evidence.

Action:

At each hearing, the lawyer should advocate for the client's goals, keeping in mind the case theory. This should include advocating for appropriate services and requesting that the court state its expectations of all parties on the record.

**F. The child's lawyer should ensure that findings of fact, conclusions of law and orders that benefit the child are included in the court's decision.**

Action:

Be familiar with the standard forms and ensure that they are completed correctly and that findings beneficial for the child are included.

Commentary:

By preparing proposed findings of fact and conclusions of law, the child's lawyer frames the case and ruling for the judge. This may result in orders that are more favorable to the child, preserve appellate issues and help the lawyer clarify desired outcomes before a hearing begins. The lawyer should offer to provide the judge with proposed findings and orders in electronic format. When an opposing party prepared the order, the child's lawyer should review it for accuracy before it is submitted to the judge for signature.

## **STANDARD 8 - POST HEARINGS**

**A. Review court orders to ensure accuracy and clarity and review with client.**

Action:

At the conclusion of the hearing, the child's trial lawyer should request and obtain a copy of the written order or court action sheet to ensure it reflects the court's verbal order. If the order is incorrect, *i.e.*, it does not reflect the court's verbal rulings, the lawyer should take whatever steps are necessary to correct it to the extent that the corrections are beneficial to the client.

Action:

Once the order is final, the child's lawyer should provide the client with a copy of the order, if age appropriate, and should review the order with the client to ensure the client understands it and the client's obligations under the order. If the client is unhappy with the order, the lawyer should counsel the client about any options to appeal or request a rehearing on the order, but should explain that the order is in effect unless a stay or other relief is secured.

Commentary:

The child may be angry about being involved in the child welfare system and a court order that is not consistent with the child's wishes could add stress and frustration. It is essential that the child's attorney take time, either immediately after the hearing or at a meeting soon after the court date, to discuss the hearing and the outcome with the client. The attorney should counsel the client about all options, including appeal (see Standard 9).

- B. The child's lawyer should take reasonable steps to ensure the client complies with court orders and to determine whether the case needs to be brought back to court.**

Action:

If the client is attempting to comply with the order but other parties, such as DHS, are not meeting their responsibilities, the child's attorney should approach the other party and seek assistance on behalf of the client. If necessary, the lawyer should bring the case back to court to review the order and the other party's noncompliance or take other steps to ensure that appropriate social services are available to the client.

Commentary:

The child's lawyer should play an active role in assisting the client in complying with court orders and obtaining visitation and any other social services. The lawyer should speak with the client regularly about progress and any difficulties the client is encountering. When DHS neglects or refuses to offer appropriate services, especially those ordered by the court, the child's lawyer should file motions to compel or motions for contempt.

## **STANDARD 9 - APPEALS ISSUES FOR CHILD'S LAWYER**

- A. Consider and discuss the possibility of appeal with the client.**

Action:

The child's lawyer should immediately consider and discuss with the client, preferably in person, the possibility of appeal when a court's ruling is contrary to the client's position or interests. Regardless of whether the lawyer believes an appeal is appropriate or that there are any viable issues for appeal, the lawyer should advise the client—at the conclusion of each hearing—that he or she has a right to appeal from any judgment or order resulting from a jurisdictional hearing, review hearing, permanency hearing or termination of parental rights trial. Further, if the hearing was held before a juvenile court referee, the child's lawyer should advise the client that he or she is entitled to a

rehearing before a juvenile court judge. Unless a rehearing is requested within 10 days following the entry of the referee's order, the order will become a final and non-appealable order.<sup>5</sup> Whether to seek a rehearing of a referee's order or to pursue a direct appeal in the appellate courts is always the client's decision.

Commentary:

When discussing the possibility of an appeal, the child's lawyer should explain both the positive and negative effects of an appeal, including how the appeal could affect the child's goals.

**B. If the client decides to appeal, the child's lawyer should timely and thoroughly facilitate the appointment of appellate lawyer.**

Action:

The child's attorney should take all steps necessary to facilitate appointing appellate lawyer *e.g.*, appointed trial lawyer should refer the case for appeal to the Office of Public Defense Services and comply with that office's referral procedures. The trial lawyer should work with the appellate lawyer and identify to the appellate lawyer the parties to the case (for example whether there are any interveners), appropriate issues for appeal and promptly respond to all requests for additional information or documents necessary for appellate lawyer to prosecute the appeal. The child's trial lawyer should promptly comply with the court's order to return exhibits necessary for appeal.

Commentary:

Pursuant to 419A.200(4), the child's lawyer must file the notice of appeal or if court-appointed, the trial attorney may discharge his or her duty to file the notice of appeal by referring the case to the Juvenile Appellate Section of the Office of Public Defense Services (OPDS) using the on-line referral form and complying with OPDS procedures.

To comply with OPDS procedures, trial lawyer referring a case to OPDS for appeal must satisfy the following conditions:

- 1) Electronically complete and submit the referral form to OPDS at least five (5) days prior to the due date for the notice of appeal. (if the referral is within fewer than 5 business days of the notice of appeal due date, trial lawyer remains responsible for filing the notice of appeal and should contact OPDS for assistance locating counsel on appeal.); and

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<sup>5</sup> ORS 419A.150(4).



- 2) Fax (503.378.2163) or email ([juvenile@opds.state.or.us](mailto:juvenile@opds.state.or.us)) to OPDS a copy of the judgment being appealed.

If OPDS must refer a case to non-OPDS counsel due to a conflict or workload issues, the following procedures apply:

- 1) OPDS will prepare a draft notice of appeal and related documents in the trial lawyer's name;
- 2) OPDS will email the draft documents to the trial lawyer for review and approval—but not for filing. If counsel notes a defect in the form of the documents, counsel should notify OPDS immediately by email at [juvenile@opds.state.or.us](mailto:juvenile@opds.state.or.us) or by telephone at 503.378.6236;
- 3) If the trial lawyer does not contact OPDS within two business days of document transmission, OPDS will assume that counsel has reviewed and approved the documents; and
- 4) An OPDS attorney will sign the notice of appeal and related documents in the trial lawyer's name, file the notice of appeal and motion to appoint appellate lawyer with the Court of Appeals, serve the parties and initiate transcript production. OPDS will also forward a copy of the documents to the client with a cover letter that includes the name and contact information of the appellate lawyer appointed to represent the client on appeal.

## **STANDARD 10 - APPEALS**

### **A. The child's trial lawyer should timely file the notice of appeal.**

#### Action:

The lawyer filing the notice of appeal must comply with statutory and rule requirements in filing the notice of appeal.

#### Commentary:

A proper notice of appeal is a jurisdictional requirement.<sup>6</sup> Consequently, the notice must satisfy statutory requirements in order to prosecute the appeal.<sup>7</sup>

ORS 419A.200(5) permits the appellate lawyer to move the court for leave to file a late notice of appeal after the statutory 30-day time limit (up to 90 days after entry of judgment). A motion to file a notice of appeal after the 30-day period, to be successful,

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<sup>6</sup> ORS 19.270.

<sup>7</sup> See ORS 19.250 (contents of notice of appeal), ORS 19.255 (time for filing notice) and ORS 419A.200(3) (juvenile appeals); see also Oregon Rules of Appellate Procedure ORAP 2.05 (contents of notice of appeal), ORAP 2.10 (separate notices of appeal) and ORAP 2.22 (appeals in juvenile cases).

must demonstrate (1) that the failure to file a timely notice of appeal was not personally attributable to the parent, *and* (2) “a colorable claim of error” exists in the proceeding from which the appeal is taken.<sup>8</sup>

## **B. The child’s appellate lawyer should communicate with the client**

### Action:

The appellate lawyer should consult with the child client in an age appropriate fashion to confirm that the client wishes to pursue the appeal and to advise the child client about the appellate process and timelines. If the client is of diminished capacity, and it is not reasonably possible to obtain direction from the child client, the appellate lawyer should determine what the child would decide if the child were capable of making an adequately considered decision. Appellate lawyers should not be bound by the determinations of the client’s position and goals made by the child’s lawyer at trial and should independently determine the client’s position and goals on appeal.

### Commentary:

The child’s appellate lawyer should explain to the child client the difference between representation for appeal and the ongoing representation in the dependency case. Because the dependency case will almost always be ongoing during the appeal, the appellate lawyer and the child’s lawyer should consult and collaborate as necessary to advance the client’s interests in both cases. Although the child’s appellate lawyer may wish to obtain information from the child’s lawyer or other parties to the case below when determining the position of a child client with diminished capacity, the appellate lawyer has the duty to make a separate determination of the child’s position on appeal in such situations.

## **C. Prosecuting or defending the appeal – Issue selection and briefing**

### Action:

The child’s appellate lawyer should review the trial court record and any opposing briefs, identify and research issues, and prepare and timely file and serve the brief on behalf of the client. The brief should reflect relevant case law and present the best legal arguments available under Oregon and federal law to advance the client’s position. Novel legal arguments that might develop favorable law in support of the client’s position should also be advanced if available. The appellate lawyer should send the child client who is able to read and the trial lawyer a copy of the filed brief.

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<sup>8</sup> See *State ex rel Dept. of Human Services v. Rardin*, 338 Or. 399, 408, 110 P3d 580 (2005). (A “colorable claim of error” in this context means “a claim that a party reasonably may assert under current law and that is plausible given the facts and the current law (or a reasonable extension or modification of current law.”)).

Commentary:

The court-appointed appellate lawyer has considerable authority over the manner in which an appeal is presented. It is the appellate attorney's responsibility to exercise his or her professional judgment to raise issues that, in the attorney's judgment, will provide the best chance of success on appeal—even when the client disagrees with the attorney's judgment.<sup>9</sup>

**D. Prosecuting or defending the appeal – Oral Argument.**

Action:

The child's appellate lawyer should determine whether to request the oral argument. The client should be informed of the lawyer's decision and if the oral argument has been requested, the lawyer should inform the client of when the oral argument will take place. If appropriate, the appellate lawyer should make arrangements for the client to attend the oral argument.

Commentary:

The child's appellate lawyer should consider whether the oral argument might advance the client's goals in the appeal and if the oral argument is desirable make a timely request for oral argument.<sup>10</sup>

**E. Communicate the results of the appeal and its implications to the client.**

Action:

The child's appellate lawyer should communicate the result of the appeal and its implications in an age appropriate fashion to the child client. If the client is able to read, a copy of the appellate decision should be provided to the child client. The appellate lawyer should also communicate the result of the appeal to the trial lawyer and provide a copy of the appellate decision as well as any needed consultation. The appellate lawyer should consider whether to petition for review in the Oregon Supreme Court and advise the child client about such a petition. Whether to petition for review is ultimately the client's decision unless the child client is of diminished capacity. When the child client is of diminished capacity, and it is not reasonably possible to obtain direction from the child client, the appellate lawyer should determine what the child would decide if the child were capable of making an adequately considered decision and proceed according to that determination.

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<sup>9</sup> See *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed2d 987 (1983).

<sup>10</sup> ORAP 6.05.

# THE OBLIGATIONS OF THE LAWYER FOR PARENTS IN CHILD PROTECTIVE PROCEEDINGS WITH ACTION ITEMS AND COMMENTARY

## STANDARD 1 - ROLE OF THE LAWYER FOR PARENTS

- A. The parent’s lawyer must maintain a normal lawyer-client relationship with the parent, including advocating for the parent’s goals and empowering the parent to direct the representation and make informed decisions.**

### Action:

Lawyers representing parents must understand the parent’s goals and pursue them vigorously. The lawyer should explain that the lawyer’s job is to represent the parent’s interests and regularly inquire as to the parent’s goals, including ultimate case goals and interim goals. The lawyer should explain all legal aspects of the case including the advantages and disadvantages of different options. At the same time, the lawyer should be careful not to usurp the parent’s authority to decide the case goals.

### Commentary:

Since many parents distrust the child welfare system, the parent’s lawyer must take care to distinguish him or herself from others in the system so the parent can see that the lawyer serves the parent’s interests. The lawyer should be mindful that parents often feel disempowered in child welfare proceedings and should take steps to make the parent feel comfortable expressing goals and wishes without fear of judgment. The lawyer should clearly explain the legal issues as well as expectations of the court and the agency, and potential consequences of the parent failing to meet those expectations. The lawyer has the responsibility to provide expertise and to make strategic decisions about the best ways to achieve the parent’s goals, but the parent is in charge of deciding the case goals and the lawyer must act accordingly.

- B. When representing parents with diminished capacity because of minority, mental impairment or for some other reason, the lawyer should as far as reasonably possible, maintain a normal lawyer/ client relationship with the parent. A parent may have the capacity to make some decisions but not others.**

Action:

The parent's lawyer must be aware of the parent's mental health status and be prepared to assess whether the parent can assist with the case.

Commentary:

Lawyers representing parents must be able to determine whether a parent's mental status (including mental illness and mental intellectual disability or developmental delay) interferes with the parent's ability to make decisions about the case. The lawyer should be familiar with any mental health diagnosis and treatment that a parent has had in the past or is presently undergoing (including any medications for such conditions). The lawyer should get consent from the parent to review mental health records and to speak with former and current mental health providers. The lawyer should explain to the parent that the information is necessary to understand the parent's capacity to work with the lawyer.

- C. When it is not reasonably possible to maintain a normal lawyer-client relationship generally or with regard to a particular issue, the parent's lawyer should conduct a thorough investigation and then determine what course of action is most consistent with protecting the parent's interests in the particular situation and represent the parent in accordance with that determination. This determination should be based on objective facts and information and not the lawyer's personal philosophy or opinion.**
- D. When the parent's lawyer reasonably believes that the parent has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken, and cannot adequately act in the parent's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the parent.**

Action:

The lawyer should choose the protective action that intrudes the least on the lawyer-client relationship and is as consistent as possible with the wishes and values of the client.

Action:

In extreme cases, i.e. where the client is at risk of substantial physical harm and cannot act in his or her own interest and where the client's lawyer has exhausted all other protective action remedies, the client's lawyer may request the court to appoint a Guardian Ad Litem.

Commentary:

When a client with diminished capacity is unable to protect him or herself from substantial harm, ORPC 1.14 allows the lawyer to take action to protect the client. Oregon Rules of Professional Responsibility 1.6(a) implicitly authorizes a lawyer to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.<sup>11</sup> Information relating to the representation of a client with diminished capacity is protected by Rule 1.6 and Rule 1.14 of the Oregon Rules of Professional Conduct.

It is generally accepted that it is error for a court to proceed without appointment of a Guardian Ad Litem (GAL) for a party when facts strongly suggest the party has diminished capacity and is unable to meaningfully the lawyer. Similarly, it is a violation of due process to fail to appoint a GAL for a parent with diminished capacity in a termination-of parental-rights proceeding. However, a parent's lawyer must maintain as regular a lawyer-parent relationship as possible and adjust representation to accommodate a parent's limited capacity.<sup>12</sup> This is not inconsistent with Oregon RPC 1.14. It states that when a client has diminished capacity and the lawyer believes the client is at risk of substantial harm, the lawyer may take certain steps to protect the client. Such steps may include consulting with family members or protective agencies or, if necessary, requesting the appointment of a guardian ad litem.

Information relating to the representation of a parent with diminished capacity is protected by Rule 1.6. When taking protective action, the lawyer is implicitly authorized under Rule 1.6(a) to reveal information about the parent, but only to the extent reasonably necessary to protect the parent's interests. Consequently, and as a general proposition, lawyers for parents should not invade a typical parent's rights beyond the extent to which it reasonably appears necessary for the lawyer to do so. In other words, lawyers should request GALs for their parents only when a parent consistently demonstrates a lack of capacity to act in his or her own interests and it is unlikely that the parent will be able to attain the requisite mental capacity to assist in the proceedings in a reasonable time.

According to a 9<sup>th</sup> circuit case from 1986, counsel for other parties to the proceeding may be obligated to advise the court of the parent's incompetence.<sup>13</sup> If it appears

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<sup>11</sup> ORCP 1.14(c)

<sup>12</sup> Oregon State Bar Formal Opinion No. 2005-159.

<sup>13</sup> United States v. 30.64 Acres, 795 F2d 796 (9<sup>th</sup> Cir 1986).

“during the course of proceedings that a party may be suffering from a condition that materially affects his ability to represent himself (if pro se), to consult with his lawyer with a reasonable degree of rational understanding... or otherwise to understand the nature of the proceedings... that information should be brought to the attention of the court promptly.”<sup>14</sup>

When a GAL is appointed for a parent, the GAL must consult with the parent’s lawyer.<sup>15</sup> The GAL also has the statutory authority to control the litigation and provide direction to the parent’s lawyer on decisions that would ordinarily be made by the parent in the proceeding.<sup>16</sup> The parent’s lawyer is required to follow such directions provided by the GAL, but must inquire at every critical stage of the proceedings as to whether the parent’s competence has changed.<sup>17</sup> If appropriate, the lawyer must request removal of the GAL.

## **STANDARD 2 - RELATIONSHIP WITH THE PARENT CLIENT**

### **A. The parent’s lawyer must meet and communicate regularly with the parent.**

#### Action:

A lawyer should make an initial contact with the parent within 24 hours and, when feasible, conduct an initial interview within 72 hours.

#### Action:

A lawyer should have contact with parents before court hearings and CRB (Citizen Review Board) reviews, in response to contact by the parent, when a significant change of circumstances must be discussed with the parent or when a lawyer is apprised of emergencies or significant events impacting the child.

#### Action:

The lawyer should ensure a qualified interpreter is involved when the lawyer and client are not fluent in the same language.

#### Commentary:

The lawyer should be available for in-person meetings or telephone calls to answer the client’s questions and address the client’s concerns. The lawyer and parent client

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<sup>14</sup> Id. at 806.

<sup>15</sup> ORS 419B.234(3)(a).

<sup>16</sup> ORS 419B.234(3)(d).

<sup>17</sup> ORS 419B.234(5).

should work together to identify and review short and long-term goals, particularly as circumstances change during the case.

**B. The parent’s lawyer should provide the parent with contact information in writing and establish a message system that allows regular lawyer-parent contact.**

Action:

The parent’s lawyer should ensure the parent understands how to contact the lawyer and that ongoing contact is integral to effective representation of the client. The lawyer should explain that even when the lawyer is unavailable, the parent should leave a message.

Action:

The lawyer must respond to parent’s messages in a reasonable time period.

Commentary:

Gaining the parent’s trust and establishing ongoing communication are two essential aspects of representing the parent. The parent may feel angry and believe that all of the lawyers in the system work with the child welfare agency and against that parent. It is important that the parent’s lawyer, from the beginning of the case, is clear with the parent that the lawyer works for the parent, is available for consultation and wants to communicate regularly. This will help the lawyer support the parent, gather information for the case and learn of any difficulties the parent is experiencing that the lawyer might help address. The lawyer should explain to the parent the benefits of bringing issues to the lawyer’s attention rather than letting problems persist. The lawyer should also explain that the lawyer is available to intervene when the parent’s relationship with the agency or provider is not working effectively. The lawyer should be aware of the parent’s circumstances, such as whether the parent has access to a telephone, and tailor the communication system to the individual parent. For example, it may involve telephone contact, email or communication through a third party when the parent agrees to it.

Communicating with parents and other parties by email may be the most effective means of regular contact. However, lawyers should also understand the pitfalls associated with communicating sensitive case history and material by email. Not only can email create greater misunderstanding and misinterpretation, it can also become documentary evidence in later proceedings. The lawyer should treat this form of communication as not confidential and advise the client accordingly.



- C. **The lawyer should counsel the parent about all legal matters related to the case, including specific allegations against the parent, the conditions for return, the parent’s rights in the pending proceeding, any orders entered against the parent and the potential consequences of failing to obey court orders or meet Court approved conditions for return.**

Action:

The lawyer should clearly explain the allegations made against the parent, what is likely to happen before, during and after trial and each hearing.

Action:

The lawyer should explain what steps the parent can take to increase the likelihood of reuniting with the child. Specifically, the lawyer should discuss in detail the Court-approved conditions for return.

Action:

The lawyer should explain any settlement options and determine whether the parent wants the lawyer to pursue such options.

Action:

The parent’s lawyer should provide or insure that the parent is provided with copies of all petitions, court orders, service plans and other relevant case documents, including reports regarding the child except when expressly prohibited by law, rule, or court order.

Action:

If the parent has difficulty reading, the lawyer should read the documents to the parent. In all cases, the lawyer should be available to discuss and explain the documents to the parent.

Commentary:

The parent’s lawyer’s job extends beyond the courtroom. The lawyer should be a counselor as well as litigator. The lawyer should be available to talk with the parent to prepare for hearings and to provide advice and information about ongoing concerns. Open lines of communication between lawyers and clients help ensure parents get answers to questions and lawyers get the information and documents they need.

The lawyer should review: the parent client's rights; the role and responsibilities of the lawyer; the role of each player in the system; alternatives and options available to the parent, including referrals to available resources in the community to resolve domestic relations issues; the consequences of selecting one option over another in light of applicable timelines, including the impact of the timelines established by the ASFA; the impact of concurrent case planning required under the AFSA on the case and the parent's participation in such planning; and the consequences of the parent client failing to appear in particular proceedings.

The lawyer should help the parent client access information about the child's developmental and other needs by speaking to service providers and reviewing the child's records. The parent client needs to understand these issues to make appropriate decisions for the child's care.

The parent's lawyer and the parent client should identify barriers to the parent engaging in services such as employment, transportation, financial issues, inability to read and language differences. The lawyer should work with the parent, caseworker and service provider to remove the barriers and advocate with the child welfare agency and court for appropriate accommodations.

A lawyer should give the parent client time to ask questions and consider the alternatives. A lawyer should obtain information from the parent about: the parent's prior contacts with the agency; the parent's knowledge about the allegations of the petition; the accuracy of information provided by the state supporting the petition; alternative or amended allegations that should be sought as part of the negotiations with the parties; services provided before removal or intervention (i.e. In-Home Safety and Reunification Services "ISRS" ); reasons for removal or intervention; services the parent feels would have avoided the need for removal; alternatives to removal, including relative placements, in-home services, or removal a person who allegedly endangers the child from the parent's and child's home; current efforts to reunify the family; family history, including paternity issues, if any, and identity of prior caretakers of the child; services needed by the child, parents or guardians; the parent's concerns about placement; the parent's long and short-term goals; and current visitation and the parent's desires concerning visitation.

The lawyer must be aware of any allegations of domestic violence in the case and not share confidential information about an alleged or potential victim's location.

A parent's lawyer should read the provisions of local court rules, state and federal law governing confidentiality of records and documents in juvenile court proceedings and understand which records and documents are deemed confidential under

applicable law. The parent's lawyer must appreciate the existing conflict or tension that exists about what documents and records that the parent's lawyer can give to the parent client and which they cannot. He or she must understand that this is an evolving area of the law and regularly review the statutes and case law in this area.

**D. The parent's lawyer should work with the parent client to develop a case timeline and calendar system.**

Action:

At the beginning of a case, the parent's lawyer should develop a timeline that reflects projected deadlines and important dates and a calendar system to remember the dates. The timeline should specify what actions the lawyer and parent will need to take and dates by which they will be completed. The lawyer and the parent should know when important dates will occur and should be focused on accomplishing the objectives in the case plan in a timely way. The lawyer should provide the parent with a timeline, outlining known and prospective court dates, service appointments, deadlines and critical points of lawyer and parent contact. The lawyer should record federal and state law deadlines in the case timeline.

Commentary:

Parents should be encouraged to create a system for keeping track of important dates and deadlines related to the case. This helps parents stay focused on accomplishing the service plan goals and meeting court-imposed deadlines.

**E. A parent's lawyer must show respect and act professionally with the client.**

Action:

A parent's lawyer should support the parent and be sensitive to the parent's individual needs. The lawyer should be vigilant against allowing the lawyer's own interests in relationships with others in the system to interfere with the lawyer's primary responsibility to the parent

Commentary:

Often lawyers practicing in abuse and neglect court are a close-knit group who work and sometimes socialize together. Maintaining good working relationships with other players in the child welfare system is an important part of being an effective advocate. The lawyer should not give the impression to the parent that relationships with other lawyers are more important than the representation the lawyer is providing the parent.

The parent must feel that the lawyer believes in him or her and is actively advocating on the parent's behalf. A parent's lawyer should remember that they may be the client's only advocate in the system.

**F. A parent's lawyer must understand confidentiality laws, as well as ethical obligations, and adhere to both with respect to information obtained from or about the client.**

Action:

A parent's lawyer must understand the laws and rules governing confidentiality. Consistent with the parent's interests and goals, the lawyer must seek to protect from disclosure confidential information concerning the parent.

Commentary:

Confidential information contained in a parent's substance abuse treatment records, domestic violence treatment records, mental health records and medical records is often at issue in abuse and neglect cases. Improper disclosure of confidential information may adversely affect the parent's chances of achieving his or her goals. For this reason, it is crucial for the lawyer to advise the parent promptly as to the advantages and disadvantages of releasing confidential information, and for the lawyer to take all necessary steps necessary to protect the parent's privileges and rights to confidentiality.

**G. The parent's lawyer must be alert to and avoid potential conflicts of interest or the appearance of a conflict of interest that would interfere with the competent representation of the parent.**

Action:

The parent's lawyer must not represent both parents if their interests differ. The lawyer should not represent both parents when there is even a potential for conflicts of interest. In situations involving allegations of domestic violence, the lawyer should never represent both parents.

Commentary:

In most cases, lawyers should not represent both parents in an abuse or neglect case. Even in cases in which there is no apparent conflict at the beginning of the case, conflicts may arise as the case proceeds. If this occurs, the lawyer will likely be required to withdraw from representing both parents. This could be difficult for the parents and delay the case. Other examples of potential conflicts of interest that the lawyer should avoid include representing multiple fathers in the same case or representing a different

party in a separate case where the same individual is a party to or has interests in the current case.

In analyzing whether a conflict of interest exists, the lawyer must consider whether : “(1) the representation of one parent will be directly adverse to another parent; (2) there is a significant risk that the representation of one or more parents will be materially limited by the lawyer’s responsibilities to another parent, a former parent or a third person or by a personal interest of the lawyer; or (3) the lawyer is related to another lawyer, as a parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.”<sup>18</sup>

**H. The parent’s lawyer must act in a culturally competent manner and with regard to the socioeconomic position of the parent throughout all aspects of representation.**

Action:

The parent’s lawyer should learn about and understand the parent’s background, determine how that has an impact on the parent’s case and always show the parent respect. The lawyer must understand how cultural, linguistic and socioeconomic differences impact interaction with parents, and must interpret the parent’s words and actions accordingly.

Commentary:

Clients and other parties involved in the child welfare system are a diverse group of people. Each person comes to this system with his or her own set of values and expectations, but it is essential that each person try to learn about and understand the backgrounds of others. An individual’s race, ethnicity, gender, sexual orientation and socioeconomic position all have an impact on how the person acts and reacts in particular situations. The parent’s lawyer must be vigilant against imposing the lawyer’s values onto the parent, and should, instead, work with the parent within the context of their culture and socioeconomic position. While the court and the child welfare agency have expectations of parents concerning their treatment of their children, the parent’s lawyer must strive to explain these expectations to the parents in a sensitive way. The parent’s lawyer should also try to explain to the court and agency how the parent’s background might affect the parent’s ability to comply with court orders and agency requests.

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<sup>18</sup> Oregon Rules of Professional Conduct, Rule 1.7(a).

**I. The parent’s lawyer should take diligent steps to locate and communicate with a missing parent and decide representation strategies based on that communication.**

Action:

The parent’s lawyer should attempt to locate and communicate with a missing parent client. If communication is established with the parent client, the lawyer should formulate positions the lawyer should take at hearings, and to understand what information the parent wishes the lawyer to share with the child welfare agency and the court.

Action:

If, after diligent steps, the lawyer is unable to communicate with the parent client, the lawyer should assess whether the parent’s interests are better served by advocating for the parent’s last clearly articulated position, or declining to state a position in further court proceedings and should act accordingly.

Action:

After a prolonged period without contact with the parent, the lawyer should consider withdrawing from representation.

Commentary:

To represent a parent adequately, the lawyer must know what the parent wishes. It is, therefore, important for parents’ lawyers to take diligent steps to locate missing parents. The lawyer should be aware that in some circumstances, it is contrary to the client’s interests to advise DHS or other parties that they have lost contact with their client. Diligent steps may include speaking with the parent’s family, the caseworker, the foster care provider and other service providers and checking OJCIN Odyssey and jail rosters. It may include sending mail to the client’s last known address as well as visiting the client’s last known address and ask anyone who lives there for information about the client’s whereabouts. Additionally, the lawyer may leave business cards with contact information with anyone who might have contact with the client as long as this does not compromise confidentiality.

If the lawyer is unable to find and communicate with the client after initial consultation, the lawyer should assess what action would best serve the parent client’s interests. This decision must be made on a case-by-case basis. In some cases, the lawyer may decide to take a position consistent with the client’s last clearly articulated position. In other cases the client’s interests may be better served by the lawyer declining to participate in the court proceedings in the absence of the client because that may better protect the client’s right to vacate orders made in the client’s absence.

A parent's lawyer should be familiar with the grounds and procedures for motions to set aside under ORS 419B.923 as well the time requirements.

**J. The parent's lawyer must be aware of the unique issues an incarcerated parent faces and provide competent representation to the incarcerated parent.**

Action:

The parent's lawyer should counsel the parent as to any effects incarceration has on the agency's obligations.

Action:

The parent's lawyer must be prepared to argue against an agency's motion to be relieved of the requirements to make reasonable efforts or active efforts if the Indian Child Welfare Act (ICWA) applies toward reunification.

Action:

The parent's lawyer may need to advocate for reasonable/active efforts to be made for the incarcerated parent and to assist the parent and the agency caseworker in accessing services. The lawyer must assist the parent client by advocating both with the agency and the jail or correctional facility for these services.

Action:

Lawyers must know Oregon's statutory and case law concerning incarceration as a basis for termination of parental rights.

Action:

The parent's lawyer should counsel the parent on the importance of maintaining regular contact with the child while incarcerated. The lawyer should assist in developing a plan for communication and visitation by obtaining necessary court orders and working with the caseworker as well as the correctional facility's social worker.

Action:

The lawyer for an incarcerated parent may need to visit the parent in the jail or prison or engage in more extensive phone or mail contact than with other clients. The lawyer should be aware of the challenges to having a confidential conversation with the parent client and must attempt to obtain a confidential setting for meetings with the client.

Action:

If the parent wants to be transported to court for a hearing, the lawyer should move the court for a transport order to do so. If the parent does not want to be present, or if having the parent present is not possible, the lawyer should explore what other means are available to have the parent participate, such as by telephone or video conference. The lawyer should obtain the necessary court order and make the necessary arrangements for the parent to participate in the hearing.

Action:

The parent's lawyer should communicate with the parent's criminal defense lawyer about issues related to self-incrimination and concerns about delaying the abuse and neglect case to strengthen the criminal case or vice versa.

Commentary:

A lawyer must be particularly diligent when representing an incarcerated parent. The lawyer should make efforts to visit an incarcerated parent at the correctional institution in which he or she is incarcerated as soon as possible after being appointed. The purpose of visiting the incarcerated parent at the correctional facility is to establish an attorney-client relationship and engage the client in case preparation. The lawyer must know why the parent client is incarcerated, the length of client's incarceration and post incarceration release requirements if applicable, particularly any potential restrictions or limitations on contact with children. If the parent is incarcerated as a result of an act against the child or another child in the family, the child welfare agency may seek an order excusing the agency from making reasonable efforts, allowing the case to be fast-tracked toward other permanency goals. If the parent opposes this step, the lawyer must oppose such a motion.

The lawyer should help the parent identify potential kinship placements and relatives who can provide care for the child while the parent is incarcerated. Lawyers must understand the implications of ASFA for an incarcerated parent who has difficulty visiting and planning for the child.

If the parent will be incarcerated for a lengthy period, and the child is not placed with the parent's relative, the lawyer should ensure that any potential placement options for the child with a relative of the parent, or other caretaker proposed by the parent, are made known to the agency and explored thoroughly.

Obtaining services such as substance abuse treatment, parenting skills or job training while in jail or prison is often difficult. The lawyer must learn about and advocate for available resources, contact the placements and attempt to get the



support of the agency and child's lawyer. Without services, it is unlikely the parent will be reunified with the child upon discharge from prison.

An incarcerated parent's contact with the child should generally, at a minimum, include cards and letters. In some instances, prisons may have technology such as videoconferencing and/or Skype that can be used for parent-child visitation. Because the time to process the required visitation paperwork varies from institution, the lawyer should begin the process of filling out and filing the forms to allow visitation between the parent client and their children. The parent's lawyer should also consult with the DHS caseworker and the parent's Department of Corrections counselor on ways to expedite approval of the parent's request for visitation.

Some prisons, such as Coffee Creek Correctional Facility in Wilsonville, Oregon, have a specialized unit for incarcerated parents and their children in a supported, child-friendly environment. If the client agrees, the lawyer should advocate for transfer of the parent to such a program as well as encouraging visits with the child through these programs.

The parent client's appearance in court frequently raises issues that require the lawyer to take action well in advance of the hearing or trial. The lawyer should find out from the parent if the parent wants to be present in court. In some prisons, inmates lose privileges if they are away from the prison, and the parent may prefer to stay at the prison rather than lose their privileges. The lawyer should explain to any parent hesitant to appear that the case will proceed without the parent's presence and discuss the potential consequences of the parent client's decision not to attend the proceeding.

**K. The parent's lawyer should take appropriate actions on collateral issues.**

Action:

The parent's lawyer should be aware of collateral issues arising during the course of representation of the client and identify such issues and, if able, counsel the client on options for advocacy on such issues. Examples include:

- 1) Pending criminal matters;
- 2) SSI and other public benefits;
- 3) Custody;
- 4) Paternity;
- 5) Immigration issues;
- 6) Child support;
- 7) Options to secure health and mental health services; and
- 8) Challenges to DHS administrative findings including denial of benefits or findings of abuse and neglect.

Commentary:

The parent's lawyer does not have an ethical duty to represent the parent client in these collateral matters where the terms of the lawyer's appointment and/or employment limit the lawyer's representation to the dependency case. A parent's lawyer must be aware of the ethical obligations to avoid providing legal advice on areas of law which they are not qualified to advise the client on. In some circumstances, the lawyer may have a duty to take limited steps to protect the parent client's rights, such as asserting the client's 5th Amendment rights to remain silent pending potential criminal prosecution.

**STANDARD 3 - TRAINING REQUIREMENTS FOR COMPETENT REPRESENTATION OF PARENT CLIENTS**

- A. A lawyer must provide competent representation to a parent client. Competent representation requires the legal knowledge, skill, training, experience, thoroughness and preparation reasonably necessary for the representation. A lawyer should only accept an appointment or retainer if the lawyer is able to provide quality representation and diligent advocacy for the client.**

Action:

A lawyer representing a parent in a dependency case should obtain and maintain proficiency in applicable substantive and procedural law and stay current with changes in constitutional, statutory and evidentiary law and local or statewide court rules.

Action:

A lawyer representing a parent in a dependency case should have adequate time and resources to competently represent the client, including maintaining a reasonable caseload and having access to sufficient support services.

- B. Before accepting an appointment or retainer as a lawyer for a parent in a child dependency or termination of parental rights case, the lawyer should gain experience by observing and serving as co-counsel in dependency and termination of parental rights cases. While accepting appointment or retainers for parents in dependency and termination of parent rights cases, the lawyer should participate in at least 16 hours of continuing legal education (CLE) related to juvenile law each year.**

Action:

A lawyer representing a parent in a dependency case must have served as counsel or co-counsel in at least two dependency cases adjudicated before a judge or have observed at least five dependency cases adjudicated before a judge.

Action:

A lawyer representing a parent in a termination-of-rights case must have served as counsel or co-counsel in or observed dependency cases as described above and have served as counsel or co-counsel in at least two termination of parental trials, or have observed or reviewed the transcripts of at least two termination of parental rights trials.

Commentary:

As in all areas of law, it is essential that lawyers learn the substantive law as well as local practice. Lawyers should be familiar with the Qualification Standards for Court Appointed Counsel, Office of Public Defense Services, Standard 4(7). Lawyers should consider the contractually-mandated training requirements as a floor rather than a ceiling, and actively pursue additional training opportunities. Newer lawyers are encouraged to work with mentors for the first three months and at a minimum should observe juvenile court hearings.

**C. A parent’s lawyer should acquire working knowledge of all relevant state and federal laws, regulations, policies and rules.**

Action:

A parent’s lawyer must read and understand all state laws, policies and procedures regarding child abuse and neglect, including but not limited to the following:

- 1) Oregon Revised Statutes chapters 419A and 419B, Oregon Juvenile Code;
- 2) Oregon Revised Statutes chapter 418, Child Welfare Services;
- 3) Refugee Child Act, ORS 418.925–418.945;
- 4) Oregon Revised Statutes concerning paternity, guardianships and adoption;
- 5) Interstate Compact on Placement of Children, ORS 417.200-417.260 and OAR;
- 6) Uniform Child Custody Jurisdiction and Enforcement Act, ORS 109.701-109.834 and OAR;
- 7) the basic structure and functioning of DHS and the juvenile court, including court procedures, the functioning of the citizen review board (hereinafter referred to as CRB) and court-appointed special advocates (hereinafter referred to as CASA) programs; and
- 8) Indian Child Welfare Act 25 USC §1901 -1963; BIA Guidelines; and OAR.

Action:

A parent's lawyer must be thoroughly familiar with Oregon evidence law and the Oregon Rules of Professional Conduct.

Action:

A parent's lawyer must be sufficiently familiar with the areas of state and federal law listed in Appendix A so as to be able to recognize when they are relevant to a case, and he or she should be prepared to research them when they are applicable.

- D. A parent's lawyer should have a working knowledge of placement alternatives, child development, family dynamics and parental discipline, as well as case and permanency planning, and services for children and families in dependency cases.**

Action:

The parent's lawyer must be familiar with case planning and permanency planning principles and with child welfare and family preservation services available through the Oregon Department of Human Services and available in the community and the problems they are designed to address. A parent's lawyer is encouraged to seek training in the areas listed in Appendix B.

Commentary:

The parent's lawyer should know the kinds and types of services within their communities which serve parents and children. Based on the conditions and circumstances which brought the parent and their children into the dependency system, the parent's lawyer should identify the services which will help remove the barriers to reunify the parent and their child(ren). The parent's lawyer should consult with the client about such services and whether the services address the client's needs. The parent's lawyer must be aware of cultural issues within the parent's community and be prepared in appropriate circumstances, to advocate services be made available to a parent that are culturally appropriate and meet the client's unique conditions and circumstances.

## **STANDARD 4 - GENERAL PRINCIPLES GOVERNING CONDUCT OF A CASE**

- A. A parent's lawyer should actively represent a parent in the preparation of a case, as well as at hearings.**

Action:

A parent's lawyer should develop a theory and strategy of the case to implement at hearings, including the development of factual and legal issues.

Action:

A parent's lawyer should identify family members and professionals who may already be, or who may become, a stable and long-term resource for the family.

Action:

A parent's lawyer should inform other parties and their representatives that he or she is representing a parent and expects reasonable notification prior to case conferences, changes of placement and other changes of circumstances affecting the child and the child's family.

- B. A parent's lawyer should, when consistent with the parent's interest, take every appropriate step to expedite the proceedings.**

Commentary:

Delaying a case often increases the time a family is separated and can reduce the likelihood of reunification. Appearing in court often motivates parties to comply with orders and cooperate with services. When a judge actively monitors a case, services are often put in place more quickly, visitation may be increased or other requests by the parent may be granted. If a hearing is continued and the case is delayed, the parent may lose momentum in addressing the issues that led to the child's removal or the parent may lose the opportunity to prove compliance with case plan goals. Additionally, the Adoption and Safe Families Act (ASFA) timelines continue to run despite continuances.

- C. A parent's lawyer should cooperate and communicate regularly with other professionals in the case.**

Action:

The parent's lawyer should communicate with lawyers for the other parties, the court appointed special advocates (CASA), the caseworker and service providers to learn about the client's progress and their views of the case, as appropriate.

Action:

The child's lawyer should respond promptly to inquiries from other parties and their representatives.

Commentary:

The parent's lawyer must have all relevant information to effectively represent the parent. This requires open and ongoing communication with the other lawyers and service providers working with the parent, the child and family. The parent's lawyer must be aware of local rules on this issue and seek permission to speak with represented parties when that would further the client's interests. When communicating with other parties, service providers and lawyers, the parent's lawyer should be especially mindful of confidentiality requirements.

**D. The parent's lawyer may not contact represented parties without the consent of their lawyer.**

Commentary:

Where the agency is represented by the counsel, the parent's lawyer should not talk with a caseworker without the lawyer's permission. However, in many cases, the agency has not retained the Department of Justice to represent it and in those cases the parent's lawyer may talk to caseworkers without permission. If the parent's lawyer is unsure whether the DOJ has been retained in a particular case, ask the caseworker.

In some counties, the District Attorney may appear representing the state. The DA is not counsel for the agency in these cases.

**E. The parent's lawyer should engage in case planning and advocate for social services in which the client wishes to participate.**

Action:

The parent's lawyer should advocate for the client both in and out of court.

Action:

The lawyer should counsel the client about the advantages and disadvantages of engaging in services prior to the court ordering them to engage in such services and determine whether the client is willing to engage in services. If the client is willing to engage in services, the parent's lawyer should advocate for those services.

Action:

The parent's lawyer should actively engage in case planning, including attending substantive case meetings, such as initial treatment planning meetings and case reviews of treatment plans. If the lawyer is unable to attend a meeting, the lawyer should send a delegate or advise the client not to attend.

Action:

The parent's lawyer should ensure the client asks for and receives needed services. The lawyer should not agree to services that are beyond the scope of the case. The services in which the client is engaged must be tailored to the client's needs and not merely hurdles over which the client must jump (e.g., if the client is taking parenting classes, the classes must be relevant to the underlying issue in the case).

Action:

Whenever possible, the parent's lawyer should use a social worker as part of the parent's team to help determine an appropriate case plan, evaluate social services suggested for the client and act as a liaison and advocate for the client with the service providers.

Action:

The lawyer for the parent should consider whether the child's lawyer or the CASA might be an ally on service and visitation issues. If so, the lawyer should solicit their assistance.

Action:

Pursuant to ORS 419B.389, a lawyer for a parent who believes that financial, health or other problems will prevent or delay the parent's compliance with an order of the court must inform the court of the relevant circumstances as soon as reasonable possible. If appropriate, the lawyer should also seek relief from the order under ORS 419B.923.

Commentary:

For a parent to succeed in a child welfare case, the parent should receive and cooperate with social services and maintain strong bonds with the child. It is therefore necessary that the parent's lawyer does whatever is possible to obtain appropriate services for the client and then counsel the client about participating in the services. Examples of services common to child welfare cases include: evaluations; family preservation or reunification services; medical and mental health care; drug and alcohol treatment; domestic violence prevention, intervention or treatment; parenting education; education and job training; housing; child care; and funds for public transportation so the client can attend services.

**F. The parent's lawyer should advocate strongly for frequent visitation in a family-friendly setting.**

Action:

When necessary, the parent's lawyer should seek court orders to compel the child welfare agency to provide frequent, unsupervised visitation to the client. The lawyer may also need to take action to enforce previously entered orders.

Action:

The parent's lawyer should advocate for an effective visiting plan and counsel the parent on the importance of regular contact with the child. Courts and the Department of Human Services (DHS) may need to be pushed to develop visitation plans that best fit the needs of the individual family. Factors to consider in visitation plans include:

- 1) Developmental age of child;
- 2) Frequency;
- 3) Length;
- 4) Location;
- 5) Supervision;
- 6) Types of activities; and
- 7) Visit coaching - having someone at the visit who could model effective parenting skills.

Commentary:

Frequent high quality visitation is one of the best predictors of successful reunification between a parent and child. Often visits are arranged in settings that are uncomfortable and inhibiting for families. It is important that the parent's lawyer seek a visitation order that will allow the best possible visitation. The lawyer should advocate that visits be unsupervised or at the lowest possible level of supervision, e.g. families often are more comfortable when relatives, family friends, clergy or other community members are recruited to supervise visits rather than caseworkers.

Lawyers should advocate for visits to occur in the most family-friendly locations possible, such as in the family's home, parks, libraries, restaurants, places of worship or other community venues.

A lawyer for an incarcerated parent must be aggressive in ensuring frequent, high quality visitation. In general, visits in prison are governed by the Department of Corrections directives, available on line, which tend to be far more generous than the practices (as opposed to the policies) of DHS. A lawyer may need to be personally familiar with the visitation rules and visiting rooms of a particular prison to be an effective advocate for the parent.



## **STANDARD 5 - INVESTIGATION**

- A. The parent’s lawyer should conduct a thorough, continuing and independent review and investigation of the case, including obtaining information, research and discovery in order to prepare the case for trial and hearings.**

**Action:**

The parent’s lawyer must thoroughly prepare each case including working with investigators and social workers to prepare the case. If necessary, the lawyer should request OPDS for funds for investigation.

**Action:**

The parent’s lawyer should review the record of the case (formerly the legal file) and the supplemental confidential file (formerly the social file).

**Action:**

The parent’s lawyer should contact lawyers for the other parties and any court-appointed special advocate (CASA) for background information.

**Action:**

The parent’s lawyer should contact and meet with the child, with permission of the child’s lawyer.

**Action:**

The lawyer should obtain necessary authorizations for the release of information.

**Action:**

The lawyer should interview individuals involved with the parent and the child.

**Action:**

The parent’s lawyer should review relevant photographs, video or audio recordings, and other evidence.

**Action:**

The lawyer should attend treatment, placement and administrative hearings involving the parent and child as needed.

Action:

The parent's lawyer should determine whether obtaining independent evaluations or assessments of the client is needed for the investigation of the case.

Action:

A parent's lawyer should research and review relevant statutes and case law to identify defenses and legal arguments to support the parent's case.

Commentary:

If possible, the parent's lawyer should work with a team that includes social workers and investigators who can meet with parents and assist in investigating the underlying issues that arise as the case proceeds. If not possible, the lawyer is still responsible for gaining all pertinent case information, being mindful of not making himself or herself a witness.

A thorough investigation is an essential element of preparation. The parent's lawyer cannot rely solely on what the agency caseworker reports about the parent. Rather, the lawyer should review the agency file; meet with the parent as soon as possible and thoroughly interview the parent for information pertaining to the issues; and contact and interview any potential witnesses, including, but not limited to service providers who work with the parent and or the parent's child or family, relatives who can discuss the parent's care of the child(ren), community supports such as clergy, neighbors, child care providers, the child(ren)'s teacher or other natural supports who can clarify information relevant to the case.

**B. The parent's lawyer should counsel the parent well before each hearing, in time to use parent information for the case investigation.**

Action:

The parent's lawyer should meet with the parent regularly throughout the case. The meetings should occur well before any hearings, not at the courthouse just minutes before the case is called before the judge. The lawyer should ask the parent questions to obtain information to prepare the case and strive to create a comfortable environment so the parent can ask the lawyer questions. The lawyer should use these meetings to prepare for court as well as to counsel the parent concerning issues that arise during the course of the case. Information obtained from the parent should be used to propel the investigation. The lawyer should work collaboratively with the parent to ascertain independent sources to corroborate the parent's information.

Commentary:

Often, the parent is the best source of information for the lawyer and the lawyer should set aside time to obtain that information. Since the interview may involve disclosure of sensitive or painful information, the lawyer should explain lawyer-parent confidentiality to the parent. The lawyer may need to work hard to gain the parent's trust, but if a trusting relationship can be developed, the lawyer will be a better advocate for the parent. The investigation will be more effective if guided by the parent, as the parent generally knows firsthand what occurred in the case.

**C. The parent's lawyer should review the child welfare agency case file.**

Action:

The parent's lawyer should ask for and review the agency case file as early during the course of representation as possible and at regular intervals throughout the case.

Action:

After a review of the agency file, the lawyer should determine if any records or case notes of any social worker or supervisor have not been placed in the file and move to obtain those records as well either through informal or formal discovery.

Commentary:

Even if the lawyer is voluntarily given contents of the DHS file in paper or electronic format, the lawyer should also look at the actual file in the DHS office and request disclosure of all documents relating to the case from DHS, since the department may have additional items not given to the lawyer. If requests to obtain copies of the agency file are unsuccessful or slow in coming, the lawyer should pursue formal disclosure under the statute. If the agency case file is inaccurate, the lawyer should seek to correct it. The lawyer must read the case file and request disclosure of documents periodically because information is continually being received by the agency.

**D. The parent's lawyer must obtain all necessary documents, including copies of all pleadings and relevant notices filed by other parties and respond to requests for documents from other parties.**

Action:

A lawyer should comply with disclosure statutes and use the same to obtain names and addresses of witnesses, witness statements, results of evaluations or other information relevant to the case.

Commentary:

As part of the discovery phase, the lawyer should review the following kinds of documents:

- 1) Social service records, including information about services provided in the past, visitation arrangements, the plan for reunification and current and planned services;
- 2) Medical records;
- 3) School records;
- 4) Evaluations of all types;
- 5) Housing records ; and
- 6) Employment records.

**E. The parent’s lawyer should have potential witnesses, including adverse witnesses, interviewed by an investigator and, when appropriate, subpoenaed.**

Action:

The lawyer should have potential witnesses interviewed by an investigator. Potential witnesses may include:

- 1) School personnel;
- 2) Neighbors;
- 3) Relatives;
- 4) Caseworkers;
- 5) Foster parents and other caretakers;
- 6) Mental health professionals;
- 7) Physicians;
- 8) Law enforcement personnel; and
- 9) The child(ren).

Action:

If a lawyer conducts a witness interview, the lawyer should do so in the presence of a third person who can be available to appear as a witness at trial.

Action:

If an investigative report is written, and the parent’s lawyer intends to call the individual as a witness, the parent’s lawyer must comply with the disclosure requirements of 419 B.881.

Commentary:

It is a good practice to have interviews conducted by an investigator employed by the lawyer. If the lawyer conducts the interview, a third person, such as a member of the lawyer's office, should be present so that the third person can be used at trial to impeach the witness.

Action:

When appropriate, the parent's lawyer, or the lawyer's trained and qualified staff, should observe visitations between the parent and child.

**STANDARD 6 - COURT PREPARATION**

**A. The parent's lawyer should develop a case theory and strategy to follow at hearings and negotiations.**

Action:

Once the parent's lawyer has completed the initial investigation and discovery, including interviews with the client, the lawyer should develop a strategy for representation.

Commentary:

The strategy may change throughout the case, as the client makes or does not make progress, but the initial theory is important to assist the lawyer in staying focused on the client's wishes and on what is achievable. The theory of the case should inform the lawyer's preparation for hearings and arguments to the court. It should also be used to identify what evidence is needed for hearings and the steps to move the case toward the client's ultimate goals (e.g., requesting increased visitation, reunification services, etc.).

**B. The parent's lawyer should timely file all pleadings, motions, objections and briefs, and research applicable legal issues and advance legal arguments when appropriate.**

Action:

The parent's lawyer must file answers and responses, motions, objections and discovery requests and responsive pleadings or memoranda that are appropriate for the case. The pleadings and memoranda must be thorough, accurate and timely. The pleadings must be served on the lawyers or unrepresented parties.

Action:

When a case presents a complicated or new legal issue, the parent's lawyer should conduct the appropriate research before appearing in court. The lawyer should be prepared to distinguish case law that appears unfavorable.

Action:

If it would advance the client's case, the parent's lawyer should present a memorandum of law to the court.

Commentary:

Filing motions, pleadings and memoranda benefits the client. The lawyer who actively litigates issues highlights important issues for the court and builds credibility for the lawyer. In addition to filing responsive papers and discovery requests, the lawyer should seek court orders when that would benefit the client, e.g., filing a motion to enforce court orders to ensure the child welfare agency is meeting its reasonable/active efforts obligations. When out-of-court advocacy is not successful, the lawyer should not wait to bring the issue to the court's attention. Arguments in child welfare cases are often fact-based. Nonetheless, lawyers should ground their argument in statutes, OARs and case law. Additionally, while non-binding, law from other jurisdictions can be used to persuade a court.

At times, competent representation requires advancing legal arguments that are not yet accepted in the jurisdiction. Lawyers should preserve legal issues for appellate review by making a record even if the argument is unlikely to prevail at trial level.

Appropriate pretrial motions include but are not limited to:

- 1) Discovery motions;
- 2) Motions challenging the constitutionality of statutes and practices;
- 3) Motions to strike, dismiss or amend the petitions;
- 4) Motions to transfer a case to another county;
- 5) Evidentiary motions and motions in limine;
- 6) Motions for additional shelter hearings;
- 7) Motions for change of venue;
- 8) Motions to consolidate; and
- 9) Motions to sever.

Note: Under ORS 28.110, when a motion challenges the constitutionality of a statute, it must be served on the Attorney General.

Action:

A lawyer should make motions to meet the client's needs pending trial.

Commentary:

Examples of such motions include:

- 1) Motion for family reunification services;
- 2) Motion for medical or mental health treatment;
- 3) Motion for change of placement;
- 4) Motion to increase, parental or sibling visitation;
- 5) Motion seeking child support or waiver of obligation to pay child support;
- 6) Motion seeking contempt for violations of court orders; and
- 7) Motion to establish, disestablish or challenge paternity pursuant to chapter 419B.

**C. With the client's permission, and when appropriate, the parent's lawyer should engage in settlement negotiations and mediation to resolve the case quickly.**

Action:

The parent's lawyer should, when appropriate (e.g., after sufficient investigation determines that the petition will likely be granted), participate in settlement negotiations to promptly resolve the case, keeping in mind the effect of continuances and delays on the client's goals.

Commentary:

Negotiation and mediation often result in detailed agreement among parties about actions the participants must take. Generally, when agreements have thoroughly been discussed and negotiated, all parties, including the parents, feel as if they had a say in the decision and are more willing to adhere to a plan. Mediation can resolve a specific conflict in a case, even if it does not result in an agreement about the entire case. Negotiated agreement about facts sufficient to allow the court to enter jurisdictional findings can move a case along more swiftly.

Action:

Parent's lawyers should be trained in mediation and negotiation skills and be comfortable resolving cases outside a courtroom setting when consistent with the client's position. With the agreement of the client, the parent's lawyer should share information about services in which the parent is engaged and provide copies of

favorable reports from service providers. This information may affect settlement discussions.

Action:

The lawyer must communicate all settlement offers to the client and discuss their advantages and disadvantages with the client. Specifically, the lawyer should fully explain to the client the rights that would be waived by a decision to admit to facts sufficient to establish jurisdiction, including the impact of time-lines established by ORS 419B.470 et. seq.

Action:

The lawyer should explain to the client the conditions and limits of the settlement and the effect of the settlement, especially when admissions made to allegations could give rise to a criminal charge or finding of aggravated circumstances or extreme conduct. These admissions could affect future actions such as domestic relations proceedings, immigration proceedings, criminal proceedings or termination-of-parental rights petitions.

Action:

It is the client's decision whether to settle. The lawyer must be willing to try the case and not compromise solely to avoid the hearing.

Commentary:

While the parents may admit to facts, parents cannot stipulate to jurisdiction.<sup>19</sup> Jurisdiction is a legal conclusion for the judge to determine.

The facts to which the parent admits will frame the court's inquiry at all subsequent hearings as well as what actions the parent must take, the services provided and the ultimate outcome. Thus, the parent's lawyer must take care to ensure that the factual admissions made by the client are specific and limited to the allegations in the petition.

A written, enforceable agreement should be prepared whenever possible, so that all parties are clear about their rights and obligations. The parent's lawyer should ensure agreements accurately reflect the understandings of the parties. The parent's lawyer should request a hearing or move for contempt, if appropriate, if orders benefiting the parent are not obeyed.

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<sup>19</sup> Dept. of Human Services v. D.D., 238 Or. App. 134, 138, 241 P3d 1177 (2010), rev den 349 Or. 602, 249 P3d 123 (2011).



**D. The parent’s lawyer should thoroughly prepare the parent client to testify.**

Action:

The parent’s lawyer should discuss and practice the questions that the lawyer will ask the parent, as well as types of questions the parent should expect opposing counsel to ask. The parent’s lawyer should help the parent think through the best way to present information, familiarize the parent with the court setting, and offer guidance on logistical issues regarding getting to court on time and appropriate court attire.

Commentary:

Testifying in one’s own case can be affirming, but it also can be intimidating without sufficient preparation. The parent’s lawyer should be attuned to the client’s comfort level about the hearing, and ability to testify accurately and persuasively. The lawyer should provide the client with a written list of questions that the lawyer will ask, if this will help the client.

Unlike in a criminal proceeding, a parent generally cannot invoke the right not to testify in a dependency case unless the client’s testimony would potentially expose the client to criminal liability.

**E. The parent’s lawyer should identify, locate and prepare all witnesses.**

Action:

The parent’s lawyer, in consultation with the parent, should develop a witness list well before a hearing. The lawyer should not assume the agency will call a witness, even if the witness is named on the agency’s witness list. The lawyer should contact the potential witnesses to determine if they can provide helpful testimony and issue a subpoena to such witnesses.

Action:

When appropriate, witnesses should be informed that a subpoena is on its way. The lawyer should also ensure the subpoena is served. The lawyer should subpoena potential agency witnesses (e.g., a previous caseworker) who have favorable information about the client.

Action:

The parent’s lawyer should set aside time to fully prepare all witnesses personally. The lawyer should remind the witnesses about the court date.

Commentary:

Witnesses may be people with direct knowledge of the allegations against the parent, service providers working with the parent or individuals from the community who could testify generally about the client's strengths.

When appropriate, the parent's lawyer should consider working with other parties who share the parent's position (such as the child's representative) when creating a witness list, issuing subpoenas and preparing witnesses. Doctors, nurses, teachers, therapists and other potential witnesses have busy schedules and need advance warning about the date and time of the hearing. The parent's lawyer should review ORS 419B.899 and 419B.902 and local supplemental rules for the proper process and time to issue subpoenas.

Witnesses are often nervous about testifying in court. Lawyers should prepare them thoroughly so they feel comfortable with the process. Preparation will generally include rehearsing the specific questions and answers expected on direct and anticipating the questions and answers that might arise on cross-examination. Lawyers should provide written questions for those witnesses who need them.

- F. The parent's lawyer should identify, secure, prepare and qualify expert witnesses when needed. When possible, the parent's lawyer should interview opposing counsel's experts.**

Action:

Often a case requires multiple experts with different expertise, such as medicine, mental health treatment, drug and alcohol treatment, or social work. Experts may be needed for ongoing case consultation in addition to providing testimony at trial. The lawyer should consider whether the opposing party is calling expert witnesses and determine whether the parent needs to call any experts on behalf of the parent to respond to the opponent's experts.

Action:

When opposing counsel plans to call expert witnesses, the parent's lawyer should seek to interview the witnesses in advance. Lawyers should scrupulously comply with standing orders of the juvenile court regarding contact with court-ordered evaluators.

Commentary:

By contacting opposing counsel's expert witnesses in advance, the parent's lawyer will know what evidence will be presented against the client and whether the expert has any favorable information that might be elicited on cross-examination. The lawyer will

be able to discuss the issues with the client, prepare a defense and call experts on behalf of the client, if appropriate. Conversely, if the lawyer does not talk to the expert in advance, the lawyer could be surprised by the evidence and unable to represent the client competently.

## **STANDARD 7 - HEARINGS**

### **A. The parent's lawyer should prepare for and attend all hearings, including pretrial conferences.**

#### **Action:**

The parent's lawyer must prepare for and attend all hearings and participate in all telephone and other conferences with the court.

#### **Action:**

If the court proceeds in the absence of the parent's lawyer, the lawyer should file a motion to set aside.

#### **Commentary:**

The lawyer must be prepared to present in court in order to adequately represent the parent. Participating in pretrial proceedings may improve case resolution for the parent. The parent's lawyer's failure to participate in the proceedings in which all other parties are represented may disadvantage the parent. Therefore, the parent's lawyer should be actively involved in this stage. If a lawyer has a conflict with another courtroom appearance, the lawyer should notify the court and the other parties and request a short continuance. The parent's lawyer should avoid having another lawyer stand in to represent the client in court if the other lawyer is unfamiliar with the client or case.

Becoming a strong courtroom lawyer takes practice and attention to detail. The lawyer must be sure to learn the rules about presenting witnesses, impeaching testimony and entering evidence. The lawyer may wish to seek out training in trial skills and watch other lawyers to learn from them. Presenting and cross-examining witnesses are skills with which the parent's lawyer must be comfortable.

### **B. The parent's lawyer should prepare and make all appropriate motions and evidentiary objections. The parent's lawyer must be aware of the need to make a record for appeal.**

Action:

The parent's lawyer should make appropriate motions and evidentiary objections to advance the client's position during the hearing. If necessary, the lawyer should file memoranda of points and authorities in support of the client's position on motions and evidentiary issues. The parent's lawyer should always be aware of preserving legal issues for appeal.

Commentary:

It is essential that parents' lawyers understand the applicable rules of evidence and all court rules and procedures. The lawyer must be willing and able to make appropriate motions, objections and arguments (e.g., objecting to the qualification of expert witnesses, the competence of child or other witnesses, or raising the issue of the child welfare agency's lack of reasonable/active efforts).

**C. The parent's lawyer must present and cross-examine witnesses, prepare and present exhibits.**

Action:

The parents' lawyer must be able to effectively present witnesses to advance the client's position. Witnesses must be prepared in advance and the lawyer should know what evidence will be presented through the witnesses. The lawyer must also be skilled at cross-examining opposing parties' witnesses. The lawyer must know how to offer documents, photos, physical objects, electronic records, etc. into evidence.

Action:

At each hearing the lawyer should advocate for the client's goals, keeping in mind the case theory. This should include advocating for appropriate services and requesting that the court state its expectations of all parties on the record.

**D. The parent's lawyer should the opportunity to make opening and closing arguments.**

Action:

The parent's lawyer should make opening and closing arguments in the case to frame the issues around the parent's lawyer's theory of the case and ensure the judge understands the issues from the parent's perspective.

Commentary:

In many child abuse and neglect proceedings, lawyers waive the opportunity to make opening and closing arguments. However, these arguments can help shape the way the judge views the case, and therefore can help the client. Argument may be especially critical, for example, in complicated cases when information from expert witnesses should be highlighted for the judge, in hearings that take place over a number of days, or when there are several children and the agency is requesting different services or permanency goals for each of them.

It is important to be able to read the judge. The attorney shall move along when the judge is tracking the argument and elaborate on the areas that appear to need more attention.

- E. The parent’s lawyer should ensure that findings of fact, conclusions of law and orders that benefit the parent are included in the court’s decision.**

Action:

The parent’s lawyer must be familiar with the standard forms and ensure that they are completed correctly and findings beneficial for your client are included.

Commentary:

By preparing proposed findings of fact and conclusions of law, the parent’s lawyer frames the case and ruling for the judge. This may result in orders that are more favorable to the parent, preserve appellate issues and help the lawyer clarify desired outcomes before a hearing begins. The lawyer should offer to provide the judge with proposed findings and orders in electronic format. When an opposing party prepares the order, the parent’s lawyer should review it for accuracy prior to it being submitted to the judge for signature.

**STANDARD 8 - POST HEARING**

- A. The parent’s lawyer should review court orders to ensure accuracy and clarity and review with client.**

Action:

At the conclusion of the hearing, the parent’s lawyer should request and obtain a copy of the written order or judgment to ensure it reflects the court’s verbal order. If the order or judgment is incorrect, *i.e.*, it does not reflect the court’s verbal rulings, the lawyer should take whatever steps are necessary to correct it to the extent that the corrections are beneficial to the client. The parent’s lawyer should provide the client

with a copy of the order or judgment and should review the order or judgment with the client to ensure the client understands it and the client's obligations under the order. If the client is unhappy with the order, the parent's lawyer should counsel the client about any options to appeal or request a rehearing on the order, but should explain that the order is in effect unless a stay or other relief is secured.

Commentary:

The parent may be angry about being involved in the child welfare system and a court order that is not in the parent's favor could add stress and frustration. It is essential that the parent's attorney take time, either immediately after the hearing or at a meeting soon after the court date, to discuss the hearing and the outcome with the client. The parent's lawyer should counsel the client about all options, including appeal (see Standard 10).

- B. The parent's lawyer should take reasonable steps to ensure the client complies with court orders and to determine whether the case needs to be brought back to court.**

Action:

If the client is attempting to comply with the order but other parties, such as DHS, are not meeting their responsibilities, the parent's lawyer should approach the other party and seek assistance on behalf of the client. If necessary, the parent's lawyer should request a hearing to review the order and the other party's noncompliance or take other steps to ensure that appropriate social services are available to the client.

Commentary:

The parent's lawyer should play an active role in assisting the client in complying with court orders and obtaining visitation and any other social services. The attorney should speak with the client regularly about progress and any difficulties the client is encountering while trying to comply with the court order or service plan. When DHS neglects or refuses to offer appropriate services, especially those ordered by the court, the lawyer should file motions to compel or motions for contempt. When DHS does not offer appropriate services, the parent's lawyer should consider making referrals to independent social service providers.

## **STANDARD 9 - MODIFYING OR VACATING AN ORDER**

- A. The parent's lawyer may move the court to modify or set aside an order if appropriate.**

Action:

If the client fails to appear at a hearing, and the court enters an adverse judgment because of the parent's non-appearance, the parent's lawyer should not ask the court to allow him or her to withdraw. Instead, the parent's lawyer should object to entry of the judgment or order and should take prompt action to contact the client. The parent's lawyer should advise the client that if he or she is dissatisfied with the court's order or judgment the lawyer may move the court to modify or vacate the order pursuant to ORS 419B.923. If the client directs the lawyer to pursue a motion to modify or vacate the judgment, the lawyer should take prompt action to do so.

Commentary:

The parent's lawyer should be aware that ORS 419B.923 requires that a motion to modify or vacate an order or judgment of the juvenile court must be filed within a "reasonable period of time." In light of that requirement, *inter alia*, it is particularly important that the parent's lawyer inform the court that he or she wishes to continue his or her appointment in the face of the parent's non-appearance. That is particularly so in cases where the juvenile court terminates a parent's parental rights based on the parent's non-appearance. Should the parent's lawyer withdraw upon a parent's non-appearance in a termination of parental rights matter, the parent is then left without counsel to offer advice about the option of filing a motion to set aside the judgment and is without counsel to properly prepare and file the motion should one be warranted. Further, when the court has allowed the lawyer to withdraw in a termination of parental rights matter, it is unlikely that court will grant a parent's request for appointment of counsel to litigate a motion under ORS 419B.923 because upon the termination of the parent's parental rights, the parent is no longer a party to the case. In sum, in most instances, the lawyer for the parent's withdrawal upon a parent's nonappearance effectively forecloses the parenting from obtaining relief under ORS 419B.923. Thus, only after the parent's lawyer has made a good faith effort to locate his or her client and has been unable to do so during the pendency of a "reasonable period of time," should the parent's lawyer seek withdrawal or acquiesce to termination of his or her appointment.

## **STANDARD 10 - APPEALS ISSUES FOR TRIAL LAWYER**

### **A. Consider and discuss the possibility of appeal with the client.**

Action:

The parent's lawyer should immediately consider and discuss with the client, preferably in person, the possibility of appeal when a court's ruling is contrary to the client's position or interests. Regardless of whether the parent's lawyer believes an appeal is appropriate or that there are any viable issues for appeal, the lawyer should advise the

client—at the conclusion of each hearing—that he or she has a right to appeal from any judgment or order resulting from a jurisdictional hearing, review hearing, permanency hearing or termination of parental rights trial. Further, if the hearing was held before a juvenile court referee, the parent’s lawyer should advise the client that he or she is entitled to a rehearing before a juvenile court judge. Unless a rehearing is requested within 10 days following the entry of the referee’s order, the order will become a final and non-appealable order.<sup>20</sup> Whether to seek a rehearing of a referee’s order or to pursue a direct appeal in the appellate courts is always the client’s decision.

Commentary:

When discussing the possibility of an appeal, the lawyer should explain both the positive and negative effects of an appeal, including how the appeal could affect the parent’s goals. For instance, the appellate court could reverse the juvenile court and vindicate the client’s belief that the juvenile court’s jurisdiction was not warranted. Further, the filing of a notice of appeal vests the appellate court with jurisdiction to stay the juvenile court’s orders while the appeal is pending.<sup>21</sup> Alternatively, an appeal could delay the case for a long time.

**B. If the client decides to appeal, the parent’s lawyer should timely and thoroughly facilitate the appointment of appellate lawyer.**

Action:

The parent’s lawyer should take all steps necessary to facilitate appointing appellate lawyer *e.g.*, the parent’s lawyer should refer the case for appeal to the Office of Public Defense Services and comply with that office’s referral procedures. The parent’s lawyer should work with the appellate lawyer and identify to the appellate lawyer the parties to the case (for example whether there are any interveners), appropriate issues for appeal and promptly respond to all requests for additional information or documents necessary for appellate lawyer to prosecute the appeal. The parent’s lawyer should promptly comply with the court’s order to return exhibits necessary for appeal.

Commentary:

Pursuant to 419A.200(4)<sup>22</sup>, the trial attorney must file the notice of appeal or if court-appointed, the trial attorney may discharge his or her duty to file the notice of

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<sup>20</sup> ORS 419A.150(4)

<sup>21</sup> See ORS 19.360.

<sup>22</sup> ORS 419A.200(4) “The counsel in the proceeding from which the appeal is being taken shall file and serve those documents necessary to commence an appeal if the counsel is requested to do so by the party the counsel represents. If the party requesting an appeal is represented by court-appointed counsel, court appointed counsel



appeal by referring the case to the Juvenile Appellate Section of OPDS using the on-line referral form and complying with OPDS procedures.

To comply with OPDS procedures, the parent's lawyer referring a case to OPDS for appeal must satisfy the following conditions:

- 1) Electronically complete and submit the referral form to OPDS at least five (5) days prior to the due date for the notice of appeal (If the referral is within fewer than 5 business days of the notice of appeal due date, the trial lawyer remains responsible for filing the notice of appeal and should contact OPDS for assistance locating counsel on appeal.); and
- 2) Fax (503.378.2163) or email ([juvenile@opds.state.or.us](mailto:juvenile@opds.state.or.us)) to OPDS a copy of the judgment being appealed.

If OPDS must refer a case to non-OPDS counsel due to a conflict or workload issues, the following procedures apply:

- 1) OPDS will prepare a draft notice of appeal and related documents in trial lawyer's name;
- 2) OPDS will email the draft documents to trial lawyer for review and approval—but not for filing. If counsel notes a defect in the form of the documents, counsel should notify OPDS immediately by email at [juvenile@opds.state.or.us](mailto:juvenile@opds.state.or.us) or by telephone at 503.378.6236;
- 3) If the trial lawyer does not contact OPDS within two business days of the document transmission, OPDS will assume that counsel has reviewed and approved the documents; and
- 4) An OPDS attorney will sign the notice of appeal and related documents in the trial lawyer's name, file the notice of appeal and motion to appoint appellate lawyer with the Court of Appeals, serve the parties and initiate transcript production. OPDS will also forward a copy of the documents to the client with a cover letter that includes the name and contact information of the appellate lawyer appointed to represent the client on appeal.

## **STANDARD 11 - APPEALS ISSUES FOR APPELLATE LAWYER**

### **A. Timely file the notice of appeal**

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may discharge the duty to commence and appeal under this subsection by complying with policies and procedures established by the office of public defense services for appeals of juvenile court judgments.”

Action:

The parent's appellate lawyer should timely file the notice of appeal including timely serving all parties.

Commentary:

A proper notice of appeal is a jurisdictional requirement.<sup>23</sup> Consequently, the notice must satisfy statutory requirements in order to prosecute the appeal.<sup>24</sup>

ORS 419A.200(5) permits an appellate lawyer to move the court for leave to file a late notice of appeal after the statutory 30-day time limit (up to 90 days after entry of judgment). A motion to file a notice of appeal after the 30-day period, to be successful, must demonstrate that (1) the failure to file a timely notice of appeal was not personally attributable to the parent, *and* (2) "a colorable claim of error" exists in the proceeding from which the appeal is taken.<sup>25</sup>

**B. The parent's appellate lawyer should maintain communication with the client.**

Action:

If the appellate lawyer differs from the trial lawyer, the appellate lawyer should write to the client as soon as possible and confirm that he or she wishes to pursue a direct appeal and advise the client of the appellate process including relevant timelines.

Commentary:

The appellate lawyer should not be bound by the determinations of the client's position and goals as made by trial lawyer and should independently determine his or her client's position and goals on appeal.

In all cases, except appeals from a judgment, terminating a parent's parental rights the appeal from a discrete judgment and the ongoing dependency litigation will be occurring concurrently. The appellate lawyer and the trial lawyer should be thoughtful about their respective roles and relationship with the client. For example, the trial lawyer should be careful to safeguard the appeal by consulting with the appellate lawyer prior to upcoming hearings and immediately notifying the appellate lawyer

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<sup>23</sup> ORS 19.270.

<sup>24</sup> See ORS 19.250 (contents of notice of appeal), ORS 19.255 (time for filing notice) and ORS 419A.200(3) (juvenile appeals); see also Oregon Rules of Appellate Procedure (ORAP) 2.05 (contents of notice of appeal), ORAP 2.10 (separate notices of appeal) and ORAP 2.22 (appeals in juvenile cases).

<sup>25</sup> See *State ex rel Dept. of Human Services v. Rardin*, 338 Or. 399, 408, 110 P3d 580 (2005). (A "colorable claim of error" in this context means "a claim that a party reasonably may assert under current law and that is plausible given the facts and the current law (or a reasonable extension or modification of current law.)").

should the court enter any new order or judgment to determine whether the new judgment should be referred for appeal. The appellate lawyer should consult with the trial lawyer about the issues raised in the opening brief and offer to consult about properly raising issues at upcoming hearings.

The appellate lawyer should advise the client about the limited scope of his or her representation and, should the client have concerns about their ongoing case, the appellate lawyer should refer the client to trial lawyer. Ideally, the trial lawyer and the appellate lawyer will work collaboratively and strategically to obtain the best result for the client. For example, the appellate lawyer may assist the trial lawyer in identifying issues to litigate at upcoming hearings and in properly preserving issues for a subsequent appeal in the event that the parent does not prevail at trial.

### **C. Prosecuting the appeal**

#### **a. Issue Selection and Briefing**

##### Action:

The appellate lawyer should thoroughly review the judgment to ensure that it comports with the requirements of the juvenile code.<sup>26</sup> The appellate lawyer should thoroughly review the record of the hearing that is subject to appeal and identify appropriate issues to raise on direct appeal.

##### Action:

The appellate brief should be clear, concise and comprehensive and also timely filed. The brief should reflect all relevant case law and present the best legal arguments available under Oregon and federal law for the client's position. The brief should include novel legal arguments if there is a chance of developing favorable law in support of the parent's claim. The appellate lawyer should send the client and the trial lawyer a copy of the brief when it is filed.

##### Commentary:

The court-appointed appellate lawyer has considerable authority over the manner in which an appeal is presented. It is the appellate lawyer's responsibility to exercise his or her professional judgment to raise issues that, in the attorney's

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<sup>26</sup> See for example [ORS 419B.476\(5\)](#) (setting out requirements of a valid permanency judgment).

judgment, will provide the best chance of success on appeal—even when the client disagrees with the attorney’s judgment.<sup>27</sup>

**b. Oral argument**

Action:

If oral arguments are scheduled, the appellate lawyer should be prepared, organized and direct. The appellate lawyer should inform the client of whether he or she intends to present oral argument or submit the case on the briefs. If counsel intends to present oral argument, counsel should inform the client of date, time and place scheduled for oral argument. The oral argument may be waived at the discretion of the appellate lawyer in consideration of the merits of the appeal, the efficient use of resources and whether there are strategic reasons to allow the case to be submitted on the briefs.

Commentary:

As with the determination of which issues to raise on direct appeal, the appellate lawyer must exercise his or her professional judgment in determining whether to present oral argument to the appellate court.

**c. The appellate lawyer should communicate the results of the appeal and its implications to the client.**

Action:

The parent’s appellate lawyer should communicate the result of the appeal and its implications, and provide the client with a copy of the appellate decision. This appellate lawyer should promptly communicate with the trial lawyer and assist the trial lawyer with interpreting the appellate court’s decision and preparing for the next trial level event. In the event that the client does not prevail on direct appeal in the Oregon Court of Appeals, the appellate lawyer may petition for review in the Oregon Supreme Court. Whether to petition for review in the Oregon Supreme Court is ultimately the client’s decision.

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<sup>27</sup> See *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 77 L Ed2d 987 (1983). See also, *Smith v. Murray*, 477 U.S. 527, 536, 106 S. Ct. 2661, 91 L Ed 2d 434 (1986) (“[T]he process of winnowing out weaken arguments or appeal and focusing on those more likely to prevail \*\*\* is the hallmark of effective appellate advocacy.”).

APPENDIX A –

ANCILLARY AREAS OF LAW WITH WHICH LAWYERS SHOULD BE SUFFICIENTLY FAMILIAR TO  
RECOGNIZE THEIR RELEVANCE TO PARTICULAR CASES

- (1) State laws and rules of civil procedure including Uniform Trial Court Rules and Supplemental Trial Court Rules;
- (2) State laws and rules of criminal procedure;
- (3) State laws and rules of administrative procedure;
- (4) State laws concerning public benefits, education and disabilities;
- (5) State laws regarding domestic violence;
- (6) State domestic relations laws, especially those regarding paternity, guardianships and adoption;
- (7) The rights a client might have as a result of being the victim of a crime;
- (8) Indian Child Welfare Act (ICWA) 25 U.S.C. §§ 1901-1963, the ICWA Regulations, 25 C.F.R. Part 23 and the Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67, 584 (Nov. 26, 1979);
- (9) Individuals with Disabilities Education Act (IDEA), P.L. 91-230;
- (10) Interstate Compact on Placement of Children (ICPC);
- (11) The Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) and the Parental Kidnapping Prevention Act;
- (12) Titles IV-B and IV-E of the Social Security Act, including the Adoption and Safe Families Act (ASFA), 42 U.S.C. §§ 620-679 and the ASFA Regulations, 45 C.F.R. Parts 1355, 1356, 1357;
- (13) Child Abuse Prevention Treatment Act (CAPTA), P.L. 108-36;
- (14) Fostering Connections to Success and Increasing Adoptions Act of 2008, P.L. 110-351;
- (15) McKinney-Vento Homeless Assistance Act, 42 U.S.C. §§ 11431-11435;
- (16) Multi-Ethnic Placement Act (MEPA), as amended by the Inter-Ethnic Adoption Provisions of 1996 (MEPA-IEP) 42 U.S.C. § 622 (b)(9) (1998), 42 U.S.C. § 671(a)(18) (1998), 42 U.S.C. § 1996b (1998);
- (17) Foster Care Independence Act of 1999 (FCIA), P.L. 106-169;
- (18) Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794 (1982);
- (19) Family Education Rights Privacy Act (FERPA), 20 U.S.C. § 1232g;
- (20) Health Insurance Portability and Accountability Act of 1996 (HIPPA), P.L., 104-192 § 264, 42 U.S.C. § 1320d-2 (in relevant part);
- (21) Public Health Act, 42 U.S.C. § 290dd-2 and 42 C.F.R. Part 2 (pertaining to confidentiality of individual information);
- (22) Immigration laws relating to child welfare and child custody;
- (23) ORS 419B.851(3), statutory implementation of the Vienna Convention on Consular Relations, April 24, 1963, Article 36, regarding service of process, and 8 C.F.R. § 236.1;

- (24) The Hague Convention of May 29, 1993 on Protection of Children and Co-operation in Respect of Intercounty Adoption;
- (25) The International Parental Kidnapping Crime Act of 1993 (IPKCA), 18 U.S.C § 1204 (1993);
- (26) The Hague Convention on the International Aspects of Child Abduction, implemented by ICARA, 42 U.S.C. § 11603 et seq.; and
- (27) The Hague Convention on the Service of Judicial and Extrajudicial Documents Abroad.

## APPENDIX B –

### ADDITIONAL AREAS IN WHICH LAWYERS SHOULD SEEK TRAINING

- (1) Stages of child development and patterns of growth as related to child abuse and neglect;
- (2) Cultural and ethnic differences as they relate to child-rearing;
- (3) Substance abuse and resources for substance abusing families;
- (4) Domestic violence, its effect on parents, children and families and appropriate resources;
- (5) Family preservation services;
- (6) Resources for diagnosis and treatment of sexual abuse, physical abuse and emotional abuse;
- (7) Resources for the treatment and recognition of non-organic failure to thrive;
- (8) Educational, mental health and other resources for special needs children, including infants and preschoolers;
- (9) The appropriateness of various types of placement;
  - (a) The efforts that should be made to ensure a smooth, timely transition between placements;
  - (b) The effect of the placement on visitation by parents, siblings and other relatives and on the services needs of the child; and
  - (c) The transracial, transcultural and language aspects of the placement.
- (10) The importance of placing siblings together when appropriate;
- (11) Risk assessment prior to reunification;
- (12) The use and appropriateness of psychotropic drugs for children;
- (13) Government benefits available in dependency cases, such as Social Security payments including non-needy relative grants; AFDC, AFDC-FC, adoption assistance programs and crime victims programs;
- (14) Transition plans and independent living programs for teens, including emancipation issues; and
- (15) Accessing private insurance for services.

APPENDIX C –

CHECKLISTS FOR SPECIFIC HEARINGS FOR ATTORNEYS FOR CHILDREN:

**A. SHELTER HEARINGS:** At the **Shelter Hearing (as well as subsequent hearing)**, the child's lawyer should:

1. Obtain copies of all discovery including but not limited to:
  - a. Shelter report;
  - b. Police report; and
  - c. Prior Child Welfare referrals.
2. Talk with child before hearing if possible:
  - a. Purpose of hearing;
  - b. Placement preference if applicable; and
  - c. Child's preferred outcome.
3. Evidentiary Hearing:
  - a. Jurisdiction sufficient of the petition;
  - b. Appropriateness of venue;
  - c. Adequacy of notice provided to parties and Indian child's tribe if applicable:
    - 1) Determine applicability of the Indian Child Welfare Act or the Uniform Child Custody Jurisdictional Enforcement Act; and
    - 2) Transfer of the case to tribal court if appropriate.
  - d. Determine if paternity established;
  - e. Child's position on return to home without danger of suffering physical injury or emotional harm;
  - f. Has the agency made reasonable efforts (active efforts if ICWA) to prevent the need for removal;
  - g. Have diligent efforts been made to place with family;
  - h. Legal standard:
    - 1) Least restrictive and most family-like placement;
    - 2) Parent can parent at a minimally adequate level; and
    - 3) Removal (or continuation in the home) not in the best interest or welfare of the child.
  - i. Is continuation of the child in the home contrary to the child's expressed desires or whether it is in the best interest of welfare of the child to be removed from home; and
  - j. Child should remain in current school unless it is in the best interest of the child.
4. The lawyer should request any temporary orders that the client directs, including but not limited to:
  - a. Temporary restraining orders, including orders expelling an allegedly abusive parent from the home;



- b. Orders governing future conduct of the parties including not discussing allegations with child, etc.;
  - c. Orders for any services agreed-on before adjudication;
  - d. Visitation orders that are reasonable and flexible and take into consideration the child's age and activities and counseling schedules and available transportation and that specify the terms and conditions of visitation:
    - 1) OAR 419B.337(3). Under this provision, the juvenile court may, at the minimum, order that DHS provide a certain number of visits weekly and that the visits be supervised or unsupervised; and
    - 2) Lack of resources on behalf of the agency is not enough to limit visits OAR 413-070-0870(1); see also OAR 413-070-0860(1)(d)(B)(ii); OAR 413-070-0860(2)(f)(B). Visits must meet the best interest of the child.
  - e. Orders for child support if appropriate;
  - f. Order for DHS-CW to investigate relatives and friends of the family as potential placements or to place sibling groups together; and
  - g. Orders for DHS to provide appropriate treatment for the child.
5. Review the Order with the child client or child's care provider if child with diminished capacity:
    - a. Orders by referee's can be reviewed by a sitting judge; and
    - b. Right (and process) to appeal.
  6. Review the Consequences of not abiding by the Order.

**B. JURISDICTION/ADJUDICATION HEARING:** The lawyer should be fully prepared by:

1. Review and prepare materials (including fact and legal argument) available at the trial, including all pleadings, discovery and investigate reports, as well as, relevant statutes, case law and the evidence code;
2. A draft outline of:
  - a. Opening and closing statements;
  - b. Direct and cross examination plans for all witnesses based on allegations in petition; and
  - c. Findings of fact and conclusions of law to be requested at the conclusion of the hearing.
3. The child's lawyer should ensure that the child is informed of and understand the nature, obligations and consequences of the decision, and the need for the child or the child with diminished capacity's care provider to cooperate with the trial court's orders. A child's lawyer should also explain the child's rights and possibilities of post-trial motions to reconsider, set aside, modify or review the jurisdictional finding, as well as the right to appeal. The child's lawyer should explain to the child, or the care provider of a child with diminished capacity, the consequences of violating the trial court's order and the continuing jurisdiction of the court; and

4. After the jurisdictional hearing or adjudication, the child's lawyer should:
  - a. Carefully review the judgment and advise the child about potential issues for appeal;
  - b. Advise the child in writing of the timelines for filing a notice of appeal and the child lawyer's ability to represent the client on appeal; and
  - c. Assist the child in locating a lawyer to handle the appeal if the lawyer is unable to undertake such representation and take whatever steps are necessary to preserve the client's right to appeal the judgment.

If the trial lawyer is court appointed they shall timely refer the case to OPDS pursuant to OPDS procedures.

**C. DISPOSITION HEARINGS:** Explain the nature of the hearing to the child, the issues involved and alternatives available to the Court:

1. When court has found sufficient evidence to support jurisdiction - the lawyer should still, when appropriate, ask the court to not exercise jurisdiction and move to dismiss the petition on the ground that jurisdiction is not in the best interests of the child because the child and family do not require supervision, treatment or placement;
2. A lawyer should advocate the least restrictive disposition possible that can be supported and is consistent with the child's needs and desires;
3. Respond to inaccurate or unfavorable information presented by other parties;
4. Ensure that all reasonably available and mitigating factors and favorable information is presented to the court; and
5. When appropriate the lawyer should:
  - a. Request the Court to order the department to provide services and set concrete conditions of return of the child to the parent;
  - b. Be prepared to present evidence on whether the reasonableness or unreasonableness of the agency's efforts and alternative efforts were active or reasonable;
  - c. Request a no reasonable/no active efforts finding;
  - d. Request an order specifying what future services will make the changes in the family needed to correct the problems necessitating intervention and constituting "reasonable efforts" by the agency;
  - e. Request orders for services or agreements that include (but are not limited to):
    - 1) Family Preservation Services;
    - 2) Medical and mental health care;
    - 3) Drug and alcohol treatment;
    - 4) Parenting education;
    - 5) Housing;
    - 6) Recreational or social services;
    - 7) Domestic violence counseling;
    - 8) Anger-management counseling;

- 9) Independent living services;
  - 10) Sex-offender treatment; and
  - 11) Other individual services.
- f. The lawyer should assure the order includes a description of actions to be taken by parents to correct the identified problems as well as a timetable for accomplishing the changes required;
  - g. The lawyer should request specific visitation orders addressing visitation between child and parent, between siblings and between the child and other significant persons in the child's life;
  - h. The child's lawyer should, when appropriate, request an educational advocate (surrogate) for the child. When appropriate the child's lawyer should seek child support orders;
  - i. The child's lawyer should seek to ensure continued representation of the child at all future hearings and reviews - set a next date; and
  - j. The lawyer should assure that the child is informed of and understands the nature, obligations and consequences of the dispositional decision, and the need for the child to cooperate with the dispositional orders. The lawyer should also explain the child's rights and possibilities of post-trial motions to reconsider, set aside, modify or review the disposition, as well as the right to appeal. The lawyer should explain the consequences of violating the dispositional order and continuing jurisdiction of the court.

**D. REVIEW HEARINGS AND CITIZEN REVIEW BOARD REVIEWS:** The child's lawyer has a critical role at review hearings and CRB review because at the hearing the court or CRB panel reviews the child's conditions and circumstances, evaluates the parties progress toward achieving the case plan, assesses the adequacy of the services offered to the family and child, and considers whether jurisdiction should continue. The child's lawyer should be fully prepared to represent the child at all reviews and CRB's.

- 1. A child is entitled to request reviews to review issues in the case as issues arise that cannot be resolved without court intervention. The child's lawyer should seek a review to court intervention if necessary to resolve a dispute over such matters as visitation, placement or services;
- 2. Whether a review is periodic or at the request of one of the parties, the child's lawyer should conduct appropriate investigation to prepare for the review which may include:
  - a. Reviewing the agency file and the report prepared for the review and obtaining all relevant discovery;
  - b. Interviewing the child prior to the hearings and obtain supplemental reports and information for child prior to the hearings;
  - c. Interviewing the caseworker to determine his or her assessment of the case, the case plan, the child's placement and progress, and the parent's cooperation and progress;

- d. Contacting other agencies and professionals who are providing services to the child or parents and seeking appropriate documentation to verify the progress;
  - e. Interviewing other potential witnesses, which may include relatives, neighbors, school personnel and foster parents; and
  - f. Subpoenaing needed witnesses and records.
3. At all review hearings and CRB reviews, the child's lawyer should be prepared to present information supporting the child's position and whether the parties are taking the necessary steps to achieve the chosen plan in a timely fashion. The child's lawyer should consider submitting a written report on behalf of the child. The child's lawyer should address:
- a. Whether there is a basis for jurisdiction to continue;
  - b. Whether there is a need for continued placement of the child;
  - c. Reasons the child can or cannot presently be protected for the identified problems in the home even if services are provided;
  - d. Whether the agency is making reasonable or active efforts to rehabilitate and reunify the family or to achieve another permanent plan;
  - e. Why services have not been successful to date;
  - f. Whether the court-approved plan for the child meets the child's expressed desires or for a child with diminished capacity, is the best plan for the child;
  - g. Whether the case plan or service agreement needs to be clarified or modified;
  - h. The child's position on the development of the concurrent case plan;
  - i. The appropriateness of the child's placement;
  - j. Whether previous court orders regarding visitation, services and other case related issues should be modified; and
  - k. Whether jurisdiction should continue.
4. At all review hearings and CRB reviews, the child's lawyer should request specific findings and orders that advance the child's position.

**E. PERMANENT PLANNING HEARINGS:** Because this is the hearing where the court determines what the permanent plan for the child should be, including return to parent, adoption, guardianship or other planned permanent living arrangements, the child's lawyer should take particular care in preparing for a permanency hearing and ensure that she is well acquainted with the case history and case files involving the family. The child's lawyer should be prepared to present evidence and zealously advocate the child's position about the permanent plan.

- 1. The child's lawyer should consult with the other parties prior to the permanent planning hearing to determine whether the parties are in agreement on the proposed permanent plan;

2. If the hearing will be a contested permanent plan hearing, the child's lawyer should be prepared to call witnesses and advocate the child's position during the hearing:
  - a. The child's lawyer should request sufficient court time to adequately present the client's position, including live witness testimony; and
  - b. The child's lawyer should consider submitting a written permanency memorandum in support of the client's position.
3. At the permanency hearing, the lawyer should be prepared to present evidence on what the permanent plan for the child should be, including whether to continue toward a plan of family reunification, a motion to dismiss or implementation of a concurrent plan;
4. At a permanency hearing, the lawyer should request specific findings and orders that advance the child's position, including but not limited to a specific extension of time for reunification if appropriate and the specific services and progress required during that time; and
5. The child's lawyer should carefully review the court order from the permanency hearing with the child including if appropriate, the option to seek review of the order including appellate review of any final orders.

**F. TERMINATION OF PARENTAL RIGHTS HEARINGS:** Termination of parental rights is a drastic and permanent deprivation of the fundamental right of family membership which can permanently sever the legal relationship of a child from his parents as well as other members of his or her extended family. It has been said that only the death penalty is a more severe intrusion into personal liberty. Thus, the child's lawyer should be zealous and meticulous in investigating and preparing for termination of parental rights trial.

1. In preparation for a termination trial, the child's lawyer should:
  - a. Thoroughly review the entire record of the case, carefully analyzing court orders and CRB findings and recommendations;
  - b. Completely investigate the case, paying particular attention to issues unique to termination, such as the adoptability of the child and whether termination of parental rights is in the child's best interest, including:
    - 1) The child's relationship with his or her parents;
    - 2) The importance of the maintaining a relationship with the child's siblings and other relatives;
    - 3) The child's ability to bond to an adoptive resource; and
    - 4) Preserving the child's cultural heritage.
  - c. Prepare a detailed chronology of the case to use in case presentation and in developing a theory and strategy for the case;
  - d. Research termination statutes and case law, with particular attention to constitutional issues, and prepare trial memorandum if necessary;

- e. Obtain and review records to be submitted to the court and prepare objections or responses to objections to these documents;
  - f. Subpoena and carefully prepare witnesses;
  - g. If the child will be called as a witness, carefully prepare the child to testify at the termination trial;
  - h. Evaluate evidentiary issues and file motions in limine as appropriate and lay proper evidentiary foundations as needed during trial;
  - i. Be aware of the heightened standard of proof in termination cases - clear and convincing evidence for most cases, and beyond a reasonable doubt in cases covered by the Indian Child Welfare Act;
  - j. Evaluate and be prepared if necessary to move to recuse or disqualify the trial judge; and
  - k. Be aware of alternatives to termination of parental rights, including but not limited to guardianship and open adoption to achieve permanency for the child and if appropriate advocate the child's preferred permanency option.
2. The child's lawyer should meet with the child to discuss the termination petition and determine the child's position on termination of parental rights; and
3. In preparation for and during the termination trial, the child's lawyer should be:
- a. Prepared to submit a trial memorandum in support of child's position;
  - b. Prepared to offer or agree to stipulations regarding the evidence;
  - c. Prepared to offer and stipulate to facts;
  - d. Prepared to examine witnesses both on direct and cross-examination;
  - e. Prepared to lay the proper evidentiary foundations;
  - f. Prepared to make opening and closing statements; and
  - g. Create an adequate record of the case and preserve any issues appropriate for appeal.

## APPENDIX D –

### CHECKLIST FOR SPECIFIC HEARINGS FOR LAWYERS FOR PARENTS:

#### A. SHELTER HEARINGS:

1. Discovery: Obtain copies of all relevant documents:
  - a. Shelter report;
  - b. Police report; and
  - c. Prior Child Welfare referrals.
2. Client interview: Take time to talk to the client (before court), caution the client about self-incrimination, inquire about other available relatives, or safety service providers, and ask for a recess or a continuance if necessary;
3. If appropriate, assert the client's Fifth Amendment and other constitutional rights;
4. Assist the client in exercising his or her right to an evidentiary hearing to require the department to demonstrate to the court that the child can be returned home without further danger of suffering physical injury or emotional harm, endangering or harming others, or not remaining within the reach of the court process before adjudication;
5. When appropriate, present facts regarding:
  - a. Jurisdictional sufficiency of the petition;
  - b. Appropriateness of venue;
  - c. Adequacy of notice provided to parties, and tribes if applicable, particularly if they are not present;
  - d. The necessity of shelter care;
  - e. Why continuation of the child in the home would be contrary to the child's welfare or why it is not in the best interest or welfare of the child to be removed;
  - f. Whether reasonable or active efforts were made to prevent removal;
  - g. Whether diligent efforts have been made to place with family;
  - h. Do not move the child's school unless it is in the best interest of the child;
  - i. Whether reasonable and available services can prevent or eliminate the need to separate the family;
  - j. Whether the placement proposed by DHS-CW is the least disruptive and most family-like setting that meets the needs of the child;
  - k. The possibility of placement with appropriate non-custodial parents and relatives - again diligent efforts requirement;
  - l. A place for return of the child prior to the jurisdictional hearing;
  - m. If the child remains in shelter care, arrangements for visits and alternatives to shelter care to be explored such as relative placement, intensive in-home services, and medication; and

- n. Applicability of the Indian Child Welfare Act, appropriate parties and tribes to receive notice, expert testimony of ICWA cases.
6. The lawyer should: propose return to parents or placement that is the least restrictive;
  7. The lawyer should request any temporary orders that the client directs, including:
    - a. Temporary restraining orders, including orders expelling an allegedly abusive parent from the home;
    - b. Orders governing future conduct of the parties (so that they are on notice...), i.e., remaining clean and sober while the child is present, etc.;
    - c. Orders for any services agreed-on before adjudication;
    - d. Visitation orders that are reasonable and flexible and take into consideration the parties' work and counseling schedules and available transportation and that specify the terms and conditions of visitation. Take note of OAR 419B.337(3). Under this provision, the juvenile court may, at a minimum, order that DHS provide a certain number of visits weekly and that the visits be supervised or unsupervised. Further lack of resources on behalf of the agency is not enough to limit visits OAR 413-070-0870(1); see also OAR 413-070-0860(1)(d)(B)(ii); OAR 413-070-0860(2)(f)(B). Visits must meet the best interest of the child;
    - e. Orders for child support if appropriate. Be prepared to rebut the presumption - argue inability to pay and treatment costs etc. are more valuable to the child etc. See ORS 25.245, ORS 25.280;
    - f. Order for DHS-CW to investigate relatives and friends of the family as potential placements, or to place sibling groups together; and
    - g. Orders for the agency to provide appropriate treatment for the child.
  8. The lawyer should consult with the client about transfer of the case to tribal court and take appropriate action as directed by the client;
  9. Review order, rehearing, appeal or habeas. The lawyer should inform the client of the possibility of a review of the referee's or court's order at the shelter care hearing and the possibility of pursuing a writ of habeas corpus; and
  10. Review the safety plan and the consequences for not following it. If the Court sets conditions of the child's placement, the lawyer should explain to the client and any third party the conditions and potential consequences of violating those conditions. The lawyer should seek review of shelter care decisions as appropriate and advise clients or any third parties of changes in conditions for pretrial placement that would be likely to get the court to agree with the client's plan.

**B. JURISDICTION/ADJUDICATION HEARING:**

1. Have all relevant materials (including fact and legal argument) available at the trial, including all pleadings, discovery, and investigate reports, as well as, relevant statutes, case law and the evidence code;



2. Have a draft outline of:
    - a. Opening and closing statements;
    - b. Direct and cross examination plans for all witnesses;
      - 1) Prepare the client to testify; and
      - 2) If there is potential for criminal liability, the lawyer should advise the client whether to answer specific questions or assert the client's Fifth Amendment right not to answer specific questions;
    - c. If the State makes an amendment to the petition make sure there is sufficient notice/time to defend. Request continuance if necessary; and
    - d. Findings of fact and conclusions of law to be requested at the conclusion of the hearing.
  3. The lawyer should ensure that the client is informed of and understands the nature, obligations, and consequences of the decision, and the need for the client to cooperate with the trial court's orders. A lawyer should also explain the client's rights and possibilities of post-trial motions to reconsider, set aside, modify, or review the jurisdictional finding, as well as the right to appeal. The lawyer should explain the consequences of violating the trial court's order and the continuing jurisdiction of the court;
  4. After the jurisdictional hearing or adjudication, the lawyer should:
    - a. Carefully review the judgment and advise the client about potential issues for appeal;
    - b. Advise the client in writing of the timelines for filing a notice of appeal and the lawyer's ability to represent the client on appeal; and
    - c. Assist the client in locating a lawyer to handle the appeal if the lawyer is unable to undertake such representation and take whatever steps are necessary to preserve the client's right to appeal the judgment. If the trial lawyer is court appointed they shall timely refer the case to OPDS pursuant to OPDS procedures.
  5. If a child is found within the jurisdiction of a court following a parent's failure to appear and the lawyer has been relieved as counsel, the lawyer should promptly notify the client of the entry of the judgment and advise them of the steps necessary to set aside the judgment based on excusable neglect. If the lawyer is court-appointed and the client wishes to request that the judgment be set aside, the lawyer should immediately contact the court to request re-appointment and thereafter promptly file the necessary pleadings on behalf of the client.
- C. DISPOSITION HEARINGS:** At the hearing, the parent's lawyer should be prepared to present a disposition plan on behalf of the client, as well as to respond to inaccurate or unfavorable information presented by other parties, ensuring that all reasonably available and mitigating factors and favorable information is presented to the court and obtaining all appropriate order to protect the client's rights and interests. The lawyer shall be prepared to:

1. Explain to the client the nature of the hearing, the issues involved and the alternatives open to the court;
2. Investigate all sources of evidence that will be presented at the hearing and interview material witnesses. The lawyer also has an independent duty to investigate the client's circumstances, including such factors as previous history, family relations, economic conditions, and any other information relevant to disposition;
3. When court has found sufficient evidence to support jurisdiction - the lawyer should still, when appropriate, ask the court to not exercise jurisdiction and move to dismiss the petition on the ground that jurisdiction is not in the best interests of the child because the child and family do not require supervision, treatment, or placement;
4. A lawyer should advocate the least restrictive disposition possible that can be supported and is consistent with the client's needs and desires; and
5. At the hearing, a lawyer should, when appropriate should:
  - a. Request the Court to order the department to provide services and set concrete conditions of return of the child/ren to the parent;
  - b. Be prepared to present evidence on whether the reasonableness or unreasonableness of the agency's efforts and alternative efforts were active or reasonable;
  - c. Request a no reasonable/no active efforts finding;
  - d. Request an order specifying what future services will make the changes in the family needed to correct the problems necessitating intervention and constituting reasonable/active efforts by the agency;
  - e. Request orders for services or agreements that include (but are not limited to):
    - 1) Family preservation services;
    - 2) Medical and mental health care;
    - 3) Drug and alcohol treatment;
    - 4) Parenting education;
    - 5) Housing;
    - 6) Recreational or social services;
    - 7) Domestic violence counseling;
    - 8) Anger-management counseling;
    - 9) Independent living services;
    - 10) Sex-offender treatment; and
    - 11) Other individual services.
  - f. The lawyer should assure the order includes a description of actions to be taken by parents to correct the identified problems as well as a timetable for accomplishing the changes required;
  - g. The lawyer should request specific visitation orders covering visitation between child and parent, between siblings, and between the child and other significant persons;

- h. The lawyer should, when appropriate, request that the court appoint counsel, a court-appointed special advocate (CASA) or an educational advocate (surrogate parent) for the child. When appropriate the lawyer should seek child support orders;
- i. The lawyer should seek to ensure continued representation of the client at all future hearings and reviews; and
- j. The lawyer should assure that the client is informed of and understands the nature, obligations, and consequences of the dispositional decision, and the need for the client to cooperate with the dispositional orders. The lawyer should also explain the client's rights and possibilities of post-trial motions to reconsider, set aside, modify, or review the disposition, as well as the right to appeal. The lawyer should explain the consequences of violating the dispositional order and continuing jurisdiction of the court.

(Note: Rules of evidence do not apply at disposition hearings. See ORS 419B.325)

**D. REVIEW HEARINGS AND CITIZEN REVIEW BOARD REVIEWS:** The lawyer's role is critical at review and CRB review because at the hearing the court or CRB panel reviews the child's conditions and circumstances, evaluates the parties progress toward achieving the case plan, assesses the adequacy of the services offered to the family, and considers whether jurisdiction should continue. The lawyer should be fully prepared to represent the client at all reviews and CRB's.

Clients are also entitled to request reviews in the case as they arise. The lawyer should seek a review to request return of the child when any event happens that may significantly affect the need for continued placement. The lawyer should also request a review when court intervention is necessary to resolve a dispute over such matters as visitation, placement, or services.

1. Whether a review is periodic or at the request of one of the parties, the lawyer should conduct appropriate investigation to prepare for the review which may include:
  - a. Reviewing agency files and the report prepared for the review and obtaining all relevant discovery;
  - b. Interviewing the client prior to the hearings and obtain supplemental reports and information for client prior to the hearing;
  - c. Interviewing the caseworker to determine his or her assessment of the case, the case plan, the child's placement and progress, and the parent's cooperation and progress;
  - d. Contacting other agencies and professionals who are providing services to the child or parents and seeking appropriate documentation to verify the progress by the client;

- e. Interviewing other potential witnesses, which may include relatives, neighbors, school personnel, and foster parents; and
  - f. Subpoenaing needed witnesses and records.
2. At all review hearings and CRB reviews, the lawyer should be prepared to present information supporting the client's position and whether the parties are taking the necessary steps to achieve the chosen plan in a timely fashion. The lawyer should consider submitting a written report on behalf of the client. The lawyer should specifically address:
    - a. Whether there is a basis for jurisdiction to continue;
    - b. Whether there is a need for continued placement of the child;
    - c. Reasons the child can or cannot presently be protected for the identified problems in the home even if services are provided;
    - d. Whether the agency is making reasonable or active efforts to rehabilitate and reunify the family or to achieve another permanent plan;
    - e. Why services have not been successful to date;
    - f. Whether the court-approved plan for the child remains the best plan;
    - g. Whether the case plan or service agreement needs to be clarified or modified;
    - h. The client's position on the development of the concurrent case plan;
    - i. The appropriateness of the child's placement;
    - j. Whether previous court orders regarding visitation, services, and other case related issues should be modified; and
    - k. Whether jurisdiction should continue.
  3. At all review hearings and CRB reviews, the lawyer should request specific findings and orders that advance the client's case; and
  4. At all review hearings and CRB reviews, the lawyer should ensure that parents receive a clear and authoritative statement of the court's expectations, the statutory time-lines, the possibility of return of the child if sufficient progress is made, and the risk of implementation of the concurrent case plan. The lawyer should ask the court to schedule a subsequent hearing (unless wardship terminated).

**E. PERMANENT PLANNING HEARINGS:** This is the hearing where the court determines what the permanent plan for the child should be, including return to parent, adoption, guardianship, or other planned permanent living arrangements. The lawyer should take particular care in preparing for a permanency hearing and ensure that the lawyer is well acquainted with the case history and case files. The lawyer should be prepared to present favorable evidence and zealously advocate the client's position about the permanent plan.

It is the Department's burden to prove its efforts were reasonable and despite those efforts progress on behalf of the parents has not been sufficient, measured against the pled and proven basis for jurisdiction.

1. The lawyer should consider requesting that the court schedule a permanency hearing in furtherance of the client's goals;
2. The lawyer should conduct an investigation as described above. In addition the lawyer should be prepared to address what the long-term plan for the child should be, including:
  - a. A specific date on which the child is to be returned home;
  - b. A date on which the child will be placed in an alternative permanent placement;
  - c. Whether the child will remain in substitute care on a permanent or long term basis; and
  - d. Whether substitute care will be extended for a specific time, with a continued goal of family reunification.
3. At the permanency hearing, the lawyer should be prepared to present evidence on what the permanent plan for the child should be, including whether to continue toward a plan of family reunification, a motion to dismiss or implementation of a concurrent plan. The lawyer should request sufficient court time to adequately present the client's position, including live witness testimony. The lawyer should consider submitting a written permanency memorandum in support of the client's position;
4. At a permanency hearing, the lawyer should request specific findings and orders that advance the client's position, including but not limited to a specific extension of time for reunification is appropriate and the specific services and progress required during that time; and
5. The lawyer should carefully review the court order from the permanency hearing with the client and discuss a client's option to review, including appellate review of any final orders.

**F. TERMINATION OF PARENTAL RIGHTS HEARINGS** is a drastic and permanent deprivation of the fundamental right of family membership. As such, the lawyer should be zealous and meticulous in investigating and preparing for termination of parental rights hearings.

1. For zealous and meticulous advocacy, the lawyer should:
  - a. Thoroughly review the entire record of the case, carefully analyzing court orders and CRB findings and recommendations and review the case with the client;
  - b. Completely investigate the case, paying particular attention to issues unique to termination, such as the adoptability of the child and whether termination of parental rights is in the child's best interest, including:
    - 1) The child's relationship with his or her parents;
    - 2) The importance of the maintaining a relationship with the child's siblings and other relatives;

- 3) The child's ability to bond to an adoptive resource; and
  - 4) Preserving the child's cultural heritage.
- c. Prepare a detailed chronology of the case to use in case presentation and in developing a theory and strategy for the case;
  - d. Research termination statutes and case law, with particular attention to constitutional issues, and prepare trial memorandum if necessary;
  - e. Obtain and review records to be submitted to the court and prepare objections or responses to objections to these documents;
  - f. Subpoena and carefully prepare witnesses;
  - g. Carefully prepare the client to testify at the termination trial and advise the client of the consequences of failing to appear at a mandatory court appearance in termination proceeding;
  - h. Evaluate evidentiary issues and file motions in limine as appropriate and lay proper evidentiary foundations as needed during the trial;
  - i. Be aware of the heightened standard of proof in termination cases - clear and convincing evidence for most cases, and beyond a reasonable doubt in cases covered by the Indian Child Welfare Act;
  - j. Be prepared to present evidence of or address the agency's failure to adequately assist parents;
  - k. Evaluate and be prepared if necessary to move to recuse or disqualify the trial judge; and
  - l. Be aware of alternatives to termination of parental rights, including but not limited to guardianship and open adoption to achieve permanency for the child.
2. The lawyer should meet with the client to discuss the termination petition and the consequences of an involuntary judgment of termination of parental rights. The lawyer should also discuss alternatives to trial with the client, including voluntary relinquishments of parental rights, open adoption agreements, post-adoption contact agreements, guardianship, other planned permanent living agreements, conditional relinquishments and continuance of the trial. If the client wishes to pursue an alternative to trial, the lawyer should advocate for the client's position;
  3. When a parent fails to appear at a mandatory termination proceeding the lawyer should consider the following options:
    - a. To seek a continuance in order to allow the client to appear; and
    - b. To request withdrawal as lawyer of record for the absent parent.
  4. In preparation for and during the termination trial, the lawyer should be:
    - a. Prepared to submit a trial memorandum in support of client's position;
    - b. Prepared to offer or agree to stipulations regarding the evidence;
    - c. Prepared to offer and stipulate to facts;
    - d. Prepared to examine witnesses both on direct and cross-examination;
    - e. Prepared to lay the proper evidentiary foundations;
    - f. Prepared to make opening and closing statements; and

- g. Create an adequate record of the case and preserve any issues appropriate for appeal.

# **Oregon Task Force on Dependency Representation**

Established by Senate Bill 222 during  
the 78th Oregon Legislative Assembly

**Report July 2016**

For more information on the Oregon Task Force on  
Dependency Representation visit the Task Force website at  
<http://www.oregon.gov/gov/policy/Pages/LRCD.aspx>



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## Letter from the Chair

Dependency representation is important and, common misconceptions notwithstanding, can require some of the most complicated and legally challenging work performed by attorneys in our legal system. Dependency cases involve families who are in crisis, a maze of overlapping statutes and multiple sources of law, a sophisticated team of interdisciplinary service providers, and extreme time pressure. These cases pose high stakes and they create high pressure: decisions made in dependency courtrooms across our state have many short- and long-term consequences for Oregon's most vulnerable children and families.

More than 15 years ago, as the federal laws that govern child welfare policy grew more complicated and child welfare practices grew more sophisticated, the notion that dependency court was somehow of lesser stature -- or a "kiddie court" -- could no longer stand. The importance of high quality legal representation in dependency cases became increasingly clear. In that changing environment, questions arose concerning the adequacy of the models that fund, train, and regulate representation for the children, parents, state actors, and CASAs in dependency cases in Oregon. Since then, stakeholders have made numerous attempts to tackle this complicated array of issues, some of which have resulted in small changes and modest improvements, but none have produced the depth or breadth of necessary systemic changes that are recommended in this report. The recommendations of this task force, if implemented, will produce the changes to Oregon's models of dependency representation necessary to allow dependency practitioners and the child welfare system to properly perform their expected roles in this new era of child welfare.

Ultimately, the success of this Task Force and the strength of its recommendations depends on the efforts of child welfare champions from all three branches of the government who have -- and will -- come together, galvanized around two common goals: protecting the legal rights of families and improving outcomes for Oregon's most vulnerable children. These objectives spurred the task force to take a fresh, hard look at the efficacy of Oregon's current representation models and think beyond the status quo. Through a rigorous series of formal meetings, subcommittee processes, court observational opportunities, research work, and practitioner meetings across the state, the Task Force gathered critical information and empirical data, engaged in robust and sometimes difficult conversations, and then drafted, amended, and redrafted recommendations, focusing first and foremost on protecting legal rights and promoting better outcomes for Oregon's children and families.

This task force reinforced the value of three-branch work in the child welfare arena. To truly improve the child welfare system in Oregon, stakeholders from the executive, legislative, and judicial branches must continue to convene to identify, prioritize, develop, and implement changes that support shared goals and better outcomes. The

well being of Oregon's children and families must always be in the vanguard of these efforts. For this reason, the recommendations in this report call for changes in structure and practice across all three branches of government.

This report is a statewide call to action for legislators, judicial officers, department directors, and legal leadership to work toward the implementation of recommendations relevant to their roles in the child welfare system and to continue the collaborative work that this process has set in motion.

It has been an honor to chair this task force and to work with the Governor, members of the Legislative Assembly, and so many committed professionals across the state who tirelessly give their all to help the children and families of Oregon with the greatest needs. We are particularly indebted to the Governor for providing an extraordinary project administrator, Addie Smith, to support this effort. We are also much indebted to Dani Ledezma, the Governor's child welfare policy advisor, for her timely insights, and to Channa Newell, who has provided helpful legislative support.

As the report notes, there are not a few obstacles to the changes that will be necessary to produce the improved outcomes that the public expects from a functional system of dependency representation. However, the benefits to be gained are simply too great to warrant anything other than our unrelenting effort to make necessary change.

Sincerely,

A handwritten signature in cursive script that reads "David Brewer".

David Brewer

Task Force Chair

## Executive Summary

The 2015 Oregon Legislative Assembly passed Senate Bill 222 establishing the 18-member Task Force on Legal Representation in Childhood Dependency (Task Force). The Legislative Assembly asked the Task Force “to recommend models for legal representation in juvenile court proceedings that will improve outcomes for children and parents served by the child welfare system, to ensure that parties in juvenile court cases are prepared to proceed and to enable courts to resolve juvenile court proceedings as quickly and efficiently as possible.” It has been the task of this entity to review the current systems and business models used to provide representation for the government, parents, and children in child dependency cases, assess their efficacy, and provide recommendations on how to improve the dependency representation system and related practices in Oregon in order to protect due process and improve child welfare outcomes.

The Task Force gathered information on Oregon’s child welfare outcomes, Oregon’s current models of dependency representation, promising local practices, and national best practices through ten full task force meetings, five subcommittee processes, including many more meetings, various opportunities for court observation, and three informal practitioner lunches. The results of this work are presented in this final report in the series of findings and related recommendations set out below.

This is not the first time that Oregon has examined its dependency representation systems. It is, however, the first time that solutions that propose cost-effective full-representation have been recommended. Driven by a three-branch process, principles of due process, and a quest for better outcomes, this Task Force came together to look beyond the status quo and truly promote positive change, along with the inevitable compromise that outcome-driven progress requires.

### **The dependency representation system in Oregon faces a number of obstacles in fulfilling its intended purpose and functions:**

- Attorneys representing parents and children have difficulty protecting the statutory and constitutional rights of their clients when challenged with excessive caseloads and inadequate resources.
- Inconsistent state and agency representation models, a lack of uniform practice, and complicated financial models pose a challenge to timely and effective case planning and case management.
- Obstacles to adequate and effective representation for all parties stand in the way of better outcomes for Oregon’s children and families.
- The state does not provide funding for legal consultation for Court Appointed Special Advocates (CASA) program staff or volunteers.

### **High quality consistent dependency representation:**

- protects children and improves outcomes for families.
- promotes fairness and due process in the dependency system.
- ensures that lawful decisions are made based on the best possible information.
- provides attorneys with expertise and experience that enables them to champion and support system improvements.

### **Model Recommendations**

#### Parent and Child Dependency Representation

- The Oregon State Legislature should allocate the funding necessary for the Public Defense Services Commission (PDSC) and the Office of Public Defense Services (OPDS) to adopt a workload model of contracting with a caseload cap (similar to the Parent and Child Representation Program (PCRP) and the model adopted for parent representation in the state of Washington) for all counties in Oregon.

#### Government Representation

- The Oregon State Legislature should allocate funding to the Department of Human Services (DHS) to leverage federal grant and reimbursement programs to enter into a block grant (or “flat fee”) agreement with the Department of Justice (DOJ) for comprehensive agency representation in

dependency cases. Additionally, the Oregon State Legislature should grant position authority to DOJ for the additional attorneys and staff required to implement this model. Nothing in this recommendation should be construed to eliminate “the state” as a separate distinct party in dependency cases, but DHS resources should be directed to the entity that represents the agency.

#### Court Appointed Special Advocates

- Provide funds sufficient to support four statewide CASA Program Attorneys so that CASAs in Oregon have timely access to legal consultation and representation.

### **System Improvement Recommendations**

#### Unlawful Practice of Law

- A model of government representation that provides full representation for the agency will ultimately eliminate the risk of unlawful practice of law by DHS child welfare employees in the courtroom. The Task Force has recommended a model that provides for full representation for DHS.
- Should a model be adopted that does not provide the agency with full representation, the following recommendations will help mitigate unlawful practice of law by DHS employees:
  - All petitions, orders, and judgments must be prepared by an attorney or, if prepared by a non-attorney, an attorney must review, and adopt, the non-attorney’s work by signing the document to be filed with the court.
  - Employees who appear in court without an attorney either should be sworn-in as fact witnesses or, where a proper foundation has been established, as expert witnesses and present testimony pursuant to the rules of evidence.
  - Employees who appear in court without an attorney should not make legal arguments, cite to legal authority, move the court for specific relief, or advocate for a legal position.

#### Performance Standards

- Relevant performance standards should be adopted for juvenile dependency attorneys who represent parents, children, and the government. These performance standards should be regularly reviewed and updated.
- Oregon practitioners should be trained in the performance standards relevant to their practice and cross-trained in the performance standards relevant to the practice of the other attorneys in the system.
- Oregon judges should be trained in the performance standards for all juvenile dependency attorneys (parent, child, and government practitioners).
- Non-lawyers who regularly participate in the juvenile dependency system, such as Citizen Review Board (CRB) members, CASA, and DHS workers, should receive training on the performance standards.
- Performance standards for all juvenile dependency attorneys (parent, child, and government practitioners) should, to the extent practicable, be incorporated into statewide quality assurance efforts.

#### Quality Assurance

- Quality Assurance Outcome Measures should be adopted, collected, and reported to assess the effect of the current model of representation and the effect of any changes to the model recommended by this Task Force and implemented by the Legislative Assembly and the Executive Branch.
- Quality Assurance Output Measures should be adopted, collected, and reported to assess the current model of representation and the effect of any changes to the model recommended by this Task Force and implemented by the Legislative Assembly and the Executive Branch.
- A standing workgroup coordinated by the Judicial Department that includes representatives from DHS child welfare, DOJ, OPDS, and the Oregon District Attorneys Association (“ODAA”) should be formed to meet quarterly, implement the collection and reporting of the recommended quality assurance measures, and engage in a continuous quality improvement process.
- Resources should be provided to the Judicial Department to coordinate and support the Judicial Department’s facilitation of a standing workgroup with the various representatives. Resources should

also be provided to each entity supervising or coordinating the attorneys who practice in the dependency representation system (DOJ, OPDS, and ODAA) to support workgroup participation and the collection and reporting of quality assurance measures.

#### Crossover Cases

- Oregon practice should target crossover youth who have current and simultaneous involvement in the child welfare and juvenile justice system.
- A basic statewide crossover case protocol should be established with technical assistance available to counties that wish to develop a more robust protocol.
- Performance standards and training for all delinquency, dependency, and criminal practitioners should be updated (or developed) to reflect the unique nature of representation in crossover cases.
- OPDS should strive to ensure, where practicable, that a one- lawyer-one youth model is the general practice in crossover cases and identify ways to implement consistent post-disposition representation across the state, including for youth committed to the Oregon Youth Authority.

#### **Task Force Implementation Recommendations**

- A volunteer subgroup of Task Force members should continue to meet regularly to implement the recommendations of this report.

#### **Areas for Further Inquiry**

- The Task Force received testimony and presentations on several issues central to the dependency representation system that are in need of further investigation and recommendations. Improvement in these areas will better ensure the well-being of Oregon children and families, including:
  - Increased judicial resources;
  - Development of, and adequate support for, law school programs that develop a dedicated and diverse dependency workforce;
  - Reduction in disproportionate placement of children of color in out-of-home care across the state; and
  - Improved compliance with the Indian Child Welfare Act of 1978.

## Task Force Members

Senate appointed:



**Senator Jeff Kruse,**  
Senate District 1



**Senator Floyd Prozanski,**  
Senate District 4

House appointed:



**Representative Duane Stark,**  
District 4



**Representative Kathleen Taylor**  
District 41

Chief Justice Appointed:



**Honorable Justice David Brewer,**  
Oregon Supreme Court, **Task Force Chair**



**Honorable Judge Patricia Crain,**  
Circuit Judge, Jackson County Circuit Court



**Honorable Judge Daniel Murphy,**  
Presiding Judge, Linn County Circuit Court



**Leola McKenzie,**  
Director, Juvenile & Family Court Programs, Oregon Judicial Department



**Lynn Travis,**  
Program Director, CASA for Children Multnomah, Washington & Columbia Counties

Attorney General appointed:



**Fredrick Boss,**  
Deputy Attorney  
General,  
Department of  
Justice



**Joanne Southey,**  
Attorney in Charge,  
Child Advocacy  
Section, Department  
of Justice

Governor appointed:



**Clyde Saiki,**  
Director,  
Department of  
Human Services



**Nancy Cozine,**  
Executive Director,  
Office of Public  
Defense Services



**Mimi Laver,**  
Director, Legal  
Education, ABA  
Center on Children  
and the Law



**Valerie Colas,**  
Deputy Public  
Defender, Office of  
Public Defense  
Services



**Rod Underhill,**  
District Attorney,  
Multnomah County



**Angela Sherbo,**  
Supervising  
Attorney, Youth,  
Rights, & Justice

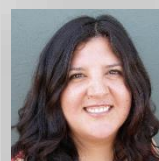


**Matt Shirtcliff,**  
District Attorney,  
Baker County

Staffing:



**Adrian (Addie)  
Smith,** Task Force  
Administrator,  
Office of Governor  
Kate Brown



**Dani Ledezma,** Policy  
Advisor, Housing &  
Human Services,  
Office of  
Governor Kate Brown



# Background

## Overview & Process

The 2015 Oregon Legislative Assembly passed Senate Bill 222, establishing the 18-member Task Force on Legal Representation in Childhood Dependency (Task Force). The membership of the Task Force includes stakeholders across the three branches of government and included:

- Two members of the Oregon Senate appointed by the President of the Senate;
- Two members of the Oregon House of Representatives appointed by the Speaker of the House;
- Two Department of Human Services (DHS) representatives appointed by the Governor;
- Two District Attorneys (DAs) appointed by the Governor;
- Three attorneys who provide legal defense services to children and parents in the dependency system appointed by the Governor;
- Three judges with juvenile court experience appointed by the Chief Justice of the Oregon Supreme Court;
- One Court Appointed Special Advocate (CASA) appointed by the Chief Justice of the Oregon Supreme Court;
- One person representing the Citizen Review Board (CRB) appointed by the Chief Justice of the Oregon Supreme Court; and
- Two representatives from the Attorney General's Office.

Recognizing the importance of the Task Force charge, the role of each branch of the government in fulfilling it, and the obstacles presented in multiple previous efforts to address it, S.B. 222 (2015) funded a full-time Task Force administrator position housed in the Governor's office.

The Legislative Assembly clearly and directly addressed the purpose of the Task Force, charging it to:

"[R]ecommend models for legal representation in juvenile court proceedings that will improve outcomes for children and parents served by the child welfare system, to ensure that parties in juvenile court cases are prepared to proceed and to enable courts to resolve juvenile court proceedings as quickly and efficiently as possible."

The Task Force was charged with reviewing the systems that fund, support, regulate, and train the attorneys who represent the government, parents, and children in dependency cases, assessing their efficacy, and providing recommendations on how to change and improve these systems. The Task Force composed a problem statement that identified two principles to guide its work: protecting due process and promoting better outcomes for Oregon children and families. In addition to identifying these shared goals, the statement also outlined the objectives and scope of the Task Force work, including:

- Identification of the obstacles to effective representation for all parties (parents, children, and the government) in dependency proceedings;
- Identification of the benefits of representation for each party in child dependency proceedings;
- Assessment of the current model of representation;
- Evaluation of the role of dependency representation in promoting good outcomes for Oregon children and families;

- Review of models of representation used by other states, recommended by national standard-setting organizations, and piloted in Oregon; and
- Assessment of discrete issues relevant to the overall function of the dependency representation system through a series of subcommittees.<sup>a</sup>

To promote these principles and fulfill these legislative directives, the Task Force process unfolded in three phases: 1) gathering information; 2) crafting solutions; and 3) making decisions. This process took place over the course of ten monthly meetings beginning in October 2015, and culminating in July 2016. Seven of the meetings were held in Marion County, and three meetings were held in Multnomah, Linn, and Jackson Counties. While in Multnomah, Linn, and Jackson counties, members met with local practitioners, observed dependency court hearings, reviewed local outcome data, and learned about local practices.

Additionally, the Task Force invited national and local experts to attend its meetings to present on various topics relevant to its charge. Presenters included law professors, parent mentors, foster youth, child welfare workers, district attorneys and deputy district attorneys, defense consortium attorneys, public defenders, assistant attorneys general, and members of the judiciary. Topics covered included:

- Defining the current models of representation;
- Understanding the obstacles and costs to high quality and consistent representation;
- Assessing the role of the dependency system in child welfare outcomes;
- The benefits of high quality and consistent representation;
- Practice differences between Oregon counties;
- Local practices of note;
- Representation models used by other states;
- National best practices;
- The role of the judiciary in an effective and efficient dependency system;
- Disproportionality; and
- ICWA compliance.

Finally, the Task Force reserved a portion of each meeting for public testimony. Citizen stakeholders and representatives from the DHS, the Department of Justice (DOJ), the Oregon District Attorney Association (ODAA), the Marion County District Attorney's Office, Children First for Oregon, the Defense Consortium in Yamhill County implementing the Parent Child Representation Program (PCRP), Metro Public Defenders, Youth, Rights, & Justice, and the Judiciary.

The Task Force also established five subcommittees to address discrete issues raised by S.B. 222 (2015): crossover cases, performance standards, quality assurance/continuous quality improvement, the unlawful practice of law, and alternative models. Local experts and practitioners comprised these subcommittees.<sup>b</sup>

Each subcommittee assessed local practices, discussed current efforts to address the issue, reviewed relevant literature, and explored national best practices. Ultimately, each subcommittee, except the Alternative Models Subcommittee, developed a report that included findings and recommendations for the larger Task Force.

At the direction of the Chair, the alternative models subcommittee convened to assess potential new and alternative models for the dependency representation system in Oregon. The charge of the Alternative Models Subcommittee included the following:

“Review the practice, cost, and outcomes of models of representation used by other states in dependency proceedings. Compare and contrast these models of representation to the current

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<sup>a</sup> See Appendix A for the full text of the Problem Statement and Scope that guided the work of the Task Force.

<sup>b</sup> See Appendix B for a chart of Subcommittee scope and membership.

Oregon model. Assess alternative models of representation used nationally or endorsed by standard-setting organizations. Present to the Task Force for further discussion information about what models save cost, protect due process, and promote outcomes. Present to the Task Force for further discussion information about how various models meet the needs and/or unique nature of Oregon dependency proceedings.”

This subcommittee, unlike the other four subcommittees, did not submit a formal report or series of recommendations for adoption by the larger Task Force. Instead, this subcommittee provided investigative support by identifying key attributes of quality models of representation in dependency cases; ranking alternative models of representation to determine the extent to which they exhibited those attributes; and reporting the findings to the full Task Force to inform discussions about the final recommendations for government, parent, and child representation.

The results of this work and the final decisions of the Task Force are presented in this report in the form of findings and the recommendations that grew from the information gathered.

## Obstacles to Effective Representation

The dependency representation system in Oregon faces a number of barriers to fulfilling its intended purpose and functions:

- Attorneys representing parents and children have difficulty protecting the rights of their clients when challenged with excessive caseloads and inadequate resources.
- Inconsistent and incomplete state and agency representation models, a lack of uniform practice, and cost drivers pose a challenge to timely and effective case planning and management.
- Obstacles to adequate and effective representation for all parties stand in the way of better outcomes for Oregon’s children and families.
- There is no state funding for legal consultation for CASA program staff or volunteer advocates.

Overcoming these barriers will lead to a more effective and efficient child welfare system across the state.

Obstacles in the dependency representation system in Oregon come in two forms: 1) obstacles that stand in the way of clients (parents, children, DHS, and CASA) accessing legal services; and 2) obstacles that prevent providers—Oregon Public Defense Services (OPDS) Contractors, DOJ and DAs—from providing legal services, with many obstacles equally affecting both access and provision of representation in dependency cases.

### **Obstacles to Accessing Legal Services**

The caseloads of attorneys for children and parents in many judicial districts in Oregon prevent clients from having access to and time with their attorneys. Burdensome caseloads also thwart attorneys’ abilities to accompany parents and children to meetings outside of court that are critical to case resolution. This problem is exacerbated by shortages of qualified attorneys and geographic distance between attorneys, clients, and the court, particularly in rural counties. Some jurisdictions have found access to pre-petition representation (a model that appoints parent/child attorneys after a family becomes involved with the child welfare agency and before a dependency petition is filed) to be a promising practice in dependency representation not provided in Oregon, but worth further exploration.

For DHS, consistency, proximity, and cost are the major obstacles to accessing legal services. As DAs represent the state (and not the agency) until the jurisdiction/dispositional phase is completed (which, under Oregon law, takes about 60-90 days), DHS frequently goes without direct representation until after this initial phase of a case, at which point cost (including travel cost) precludes DHS from obtaining adequate access to DOJ representation. Further, a disruption in the case occurs between the DA appearance when the agency is unrepresented and when DOJ appears on behalf of the agency. This affects the ability of DHS to have quality representation throughout the life of the case, at times appearing without any legal counsel, and may result in delays in services to parents and children in

compliance with state and federal laws. For CASA volunteers, the primary barrier to legal advice and consultation is a lack of dedicated funds.

There also is a need to increase the cultural and linguistic competence, and trauma-informed approach, of the attorneys in the dependency system who provide services to diverse and vulnerable populations—this includes parent, child, and CASA attorneys, and with regard to cultural competence and trauma-informed practice, government attorneys as well. This deficit currently poses another barrier to access.

### **Obstacles to the Provision of Legal Services**

Obstacles to the effective provision of parent and child representation include: funding that is insufficient to support national caseload standards, compliance with Oregon State Bar (OSB) performance standards, and implementation of a multidisciplinary model of practice; a model of contracting that does not adequately compensate attorneys for out-of-court work; case rates that incentivize and, as a practical matter, almost require attorneys to manage high caseloads in order to maintain business viability; the delayed appointment and involvement of attorneys for parents and children; and delayed discovery. High caseloads prevent attorneys from spending adequate time with clients and attending to work outside the courtroom. Where caseloads are excessively high, cases are delayed due to the unavailability of attorneys for regular court appearances.

Obstacles that prevent the provision of adequate legal services by government attorneys include the lack of consistent quality training for DAs and the absence of performance standards or performance expectations and accountability measures for both DAs and the DOJ. Additionally, the challenges posed by the differing and sometimes overlapping roles and responsibilities of the local DA's office and the DOJ, both of whom represent statutory parties (the state and DHS) in juvenile dependency cases, are also an impediment to service provision. This results in different roles, responsibilities, and attorney-client relationships for local DAs and for the DOJ. These obstacles prevent consistent and continuous representation for the state and the agency throughout the life of the case.

Further, the current payment structure still leaves many DA offices under-resourced and therefore involved only in the most limited capacity—prosecuting dependency petitions. In addition, some DA offices have elected to not appear at all or appear only at certain hearings in the jurisdictional phase in a case. Even if the state as a party separate from DHS were funded to be represented, this still leaves DHS without legal counsel from petition through jurisdiction in the majority of counties and creates a risk of legal liability. In addition, as a state agency, the legislature has determined that DHS receives funding to pay DOJ for its services at an hourly rate. DHS is required by statute to utilize only DOJ for legal representation and must authorize and approve the use of DOJ services. At times, financial factors create a disincentive for DHS to consult freely with counsel on many legal issues at the risk of exceeding its budget or are forced to choose between providing services to parents and children and obtaining legal representation. This prevents DOJ from providing critical legal services and leads to legal risk for DHS. Even after jurisdiction DHS often appears in juvenile court without any government attorney to assist in advocating the agency and/or state's legal position.

### **Obstacles Due to an Overburdened Court System**

Another obstacle that stands in the way of the effective provision of legal services is the degree to which the entire juvenile dependency court system is overburdened. This has led to overcrowded and sometimes inefficient court dockets; inconsistency among courts with regard to the types, timing, and frequency of hearings and trials; shifting of traditional court work to attorneys; under-utilization of technology, and a general inability to schedule hearings in a timely manner.

## Benefits of Effective Representation

Child welfare is a hybrid system of social work and law. For this reason, attorneys have a unique and vital role. Attorneys highlight legal issues that arise both in the courtroom and during case management, promote lawful interventions, and protect the rights, safety, and well being of Oregon children and families. High quality legal representation is essential to a well-functioning dependency system.

High quality legal representation provides the following benefits:

### **Representation Promotes Fairness and Due Process in the Dependency System**

The ability to obtain access to a skilled advocate is the cornerstone of a fair and just court system. The constitutional and statutory rights of parents and children involved in the dependency system must be protected. Similarly, the court system has a statutory obligation to ensure that Court Appointed Special Advocates (CASA) are appointed to represent children's best interests in dependency proceedings. Consistent and effective legal representation preserves the due process rights of parents and children, prevents government overreach, supports lawful casework practice, and protects Oregon families' basic civil liberties. Representation ensures that marginalized and disenfranchised Oregonians' voices will be heard in the courtroom and the child welfare process. It also promotes fairness by insisting on consistent experiences for children and families in courts and the child welfare system across the state. Legal representation for the agency enforces consideration of those constitutional rights and compliance with state and federal laws.

### **Representation Protects Children and Improves Outcomes for Families**

Consistent and effective representation for parents, children and the agency (in Oregon, DHS) has been shown to improve outcomes for children. Recent studies have shown that adequately resourced and competent representation for parents and children decreases the time to permanency for children in the child welfare system and reduces the use of foster care. In addition, consistent and effective representation for parents and children has been shown to decrease unnecessary removals, increase placement in kinship care, and provide important opportunities to meaningfully decrease disproportionality. CASA participation leads to similar outcomes.

### **Representation Provides Important Short-Term and Long-Term Cost-Savings**

Consistent and effective representation offers an opportunity for short-term and long-term cost savings for the State of Oregon. Substitute care is an expensive intervention (costing, on average, more than \$26,000 per year per child<sup>c</sup>) with additional long-term costs for the State of Oregon. Children who have been placed in foster care are more likely to be homeless, un- or under-employed, enmeshed in the delinquency and criminal justice systems, and more likely to suffer long-term physical and mental health needs. They are also less likely to graduate from high school or to receive a college education. As discussed above, consistent and effective representation for parents and children, as well as consistent presence of a CASA, have been shown to reduce the incidence of unnecessary removals and decrease the time in out-of-home care. By decreasing the number of children in care and the time a child spends in care, consistent and effective representation, in turn, decreases these short- and long-term systemic costs.

Consistent and effective representation for the agency will decrease caseworkers' legal responsibilities, freeing their time to focus on case work and increased client engagement. In addition, some caseworkers report that attending court is an extremely stressful experience that could be mitigated by consistently appearing in court with counsel. Decreasing this stress could also improve case worker morale, and decrease costly caseworker turnover. Consistent and effective legal representation for the agency has the potential to decrease state liability by providing DHS with oversight and consultation that, in turn, may protect the agency from the risks and costs of tort litigation.

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<sup>c</sup> This cost figure includes not only room and board, but personal care services, one-time payments, and staff time but does not account for court costs, legal representation, and other system costs.

Dependency proceedings have become increasingly complex, and skilled representation for all parties promotes important cost savings associated with the efficiency that representation can provide. Courtroom efficiency saves already overburdened judicial resources. Legal consultation for CASAs increases their capacity to effectively communicate recommendations and investigative findings related to the child's best interests.

### **Representation Ensures that Lawful Decisions about Oregon Families are Made Based on the Best Possible Information**

Consistent and effective representation empowers parent and child clients to meaningfully engage in the dependency process. Attorneys translate the complicated dependency system and break down decision-points into approachable choices, so that parents and children can make informed decisions throughout the course of the case. This ensures that the court will hear the perspective of parents and children. In addition, empowered clients are more likely to feel that they are being treated fairly, that the system is working with them as opposed to against them, and to engage in the dependency process and accompanying services. This promotes better outcomes for children and families.

Agency attorneys assist caseworkers in understanding the legal aspects of the dependency system and the need to build a strong legal foundation for each case management decision. Consistent and effective agency representation also increases caseworker accountability, promotes lawful practices, and mitigates the stress and administrative burden of managing complex legal filings, issues, and court proceedings. Additionally, agency attorneys provide uniformity of pleadings and legal arguments, providing consistency for families statewide. All of this frees non-legally trained workers' time for good case management practice and client contact. State attorneys provide an additional unique local community perspective and an independent legal voice to dependency cases that focuses on child safety. In the same way, legal consultation for CASAs will promote uniform state practices and will increase efficiencies with local programs.

Thus, having attorneys for all parties ensures that the best available and most balanced information is presented to the court. In addition, attorneys play an important role in ensuring that at each hearing a complete record is before the court, the most accurate findings are made, and that judgments are legally sufficient to ensure the best record for appeal. Legal representation promotes a strong healthy adversarial system and ensures that the court receives information needed to make well-informed decisions for children and families at both the trial and appellate levels in Oregon courts.

### **Attorneys are Experts who Champion and Support System Improvements**

Attorneys play an important role in child welfare system improvement. Courtroom advocacy at the trial and appellate levels not only protects the rights of individual clients, but also holds the child welfare and dependency system accountable. Courtroom representation creates needed systemic changes and clarifications with both far-reaching and immediate impacts. Attorneys are also advocates outside the courtroom; they use their deep understanding of the system and the challenges that their clients face to develop community connections and promote meaningful and effective policy improvements at the local and statewide levels.

# Findings and Recommendations

## Findings & Recommendations: Dependency Representation Models

Over the past two decades, scholars and practitioner experts have found that “quality representation and due process for all parties in the child welfare system are essential but not always achieved.”<sup>1</sup> In Oregon, it is not uncommon for one or more of the parties in a dependency proceeding to have inadequate representation—or no representation at all—during a dependency proceeding. Yet, few legal proceedings immediately affect an individual’s rights more than a juvenile dependency case where children are removed from their parents and placed in out-of-home care—an intervention with long-lasting effects on a child’s well-being. High quality and consistent legal representation for the government, parents, and children is essential for a fair and efficient legal process,<sup>2</sup> especially as the laws, policies, and judicial decisions that govern child welfare in Oregon become increasingly complex. Recognizing the benefits that attorneys provide to the child welfare system and, more specifically, the dependency system, the Task Force recommends the following strategies to improve the models that fund, support, and regulate dependency representation and to diminish obstacles to quality, consistent representation.

## Representation for Parents and Children

### 1. Findings

A national consensus is emerging: high quality and consistent legal representation for parents and children is necessary to ensure that these parties can navigate and meaningfully participate in dependency proceedings. The role of attorneys for parents and children in the child welfare system is a critical one. Parents’ and children’s attorneys serve as guides, translators, voices, and systemic counter-balances. For example, nationwide, 70% of the children in foster care are removed because of allegations that they were neglected, not abused,<sup>3</sup> and reliable data suggests that in many of these cases the children should never have been removed from their families.<sup>d</sup> To fulfill their role, parent and children’s attorneys must ensure that the voices and experiences of children and families are presented in the courtroom and decision-making meetings and that children face the trauma of removal only when absolutely necessary for their safety and well-being.

Robust parent and child representation is correlated with improved outcomes for children and families. An attorney’s advocacy for frequent visitation, family involvement, and the right service plans engages parents<sup>4</sup> and steers the case toward timely reunification.<sup>5</sup> More specifically, parent and child representation has been shown to:

- families receive more appropriate services and unnecessary removals are reduced;<sup>6</sup>
- decrease time to reunification;<sup>7</sup>
- decrease re-entry post-reunification;<sup>8</sup> and
- decrease time to other forms of permanency.<sup>9</sup>

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<sup>d</sup> According to federal statistics, more than 86,000 children removed across the country in 2009 were later found not to have been maltreated. MARTIN GUGGENHEIM & VIVEK S. SANKARAN, REPRESENTING PARENTS IN CHILD WELFARE CASES: ADVICE AND GUIDANCE FOR FAMILY DEFENDERS 21 (2015).

These improved outcomes, in turn, create cost savings and cost efficiency for states. In New York, one representation program was found to save \$9 million per year by reducing the length of stay in foster care and promoting safe reunification with parents,<sup>10</sup> while a model representation program in Washington State saved \$7.5 million in one year by reducing foster care stays.<sup>11</sup>

Nonetheless, concerns about the quality of representation for parents and children in dependency cases in Oregon's juvenile courts have existed for many years. In 2000, the *Oregon State Bar's Indigent Defense Task Force III Report* found juvenile dependency representation severely lacking, noting that clients needing juvenile dependency representation faced "an unreasonable likelihood of receiving poor representation."<sup>12</sup> In 2004, a Secretary of State audit reported an above-average risk of inadequate representation in juvenile cases.<sup>13</sup> In 2005, a legislative child welfare "sensitive case review" identified inadequate legal representation as a serious concern.<sup>14</sup> As a result, the review recommended the appropriation of an additional \$23 million to the Public Defense Services Commission for the purpose of "improving legal representation for parents and children in dependency cases, including, but not limited to, improving training, support and other resources to support court-appointed counsel."<sup>15</sup> Although this funding was not approved, the Public Defense Services Commission has made significant efforts to address quality concerns through training and contractual requirements. The lack of funding, however, yields excessive caseloads for parent and child dependency practitioners because the agency is unable to update its contracting model and associated structures.

Despite these challenges, Oregon has piloted a PCRCP in three counties. This OPDS-initiated and legislatively funded program ensures reduced caseloads, increased attorney accountability, and provides access to multidisciplinary staff and assistance. Initial data already shows signs of improved outcomes and cost efficiencies in the counties where it has been implemented:

- **Reduced Rate of Foster Care:** The initial two PCRCP counties had an average foster care reduction rate of 19% in 2014 and 13% during the first six months of 2015, compared to a statewide decrease of 4.33% in 2014 and a statewide increase of 0.44% during the first six months of 2015.<sup>16</sup>
- **Increased Reunification Rate:** In the initial two PCRCP counties, from 2014 to June 2015, the rate of reunification increased by 6.5% while the increase was 1.7% statewide.<sup>17</sup>

Although the PCRCP is one of several child welfare practice changes in these counties, these improved outcomes mirror the findings in other jurisdictions that have implemented PCRCP-like programs and highlight the important due process rights that parent and child attorneys protect. National best practices and successful models employed by other states show the nexus between high quality and consistent practice and these results.

#### A. Models of Parent and Child Dependency Representation across the Country

In 2009, the ABA Center on Children and the Law (ABA Center) collected qualitative descriptions of promising parent and child attorney models used across the country.<sup>18</sup> Finding that "[a]s the dependency system grows more complex, a variety of models that provide quality legal representation for parents and children have evolved to protect the rights of parents and promote better outcomes for children,"<sup>19</sup> the research describes three basic representation models for parents and children in use across the country:

- **Institutional parent representation organizations:** offices with a full-time staff of attorneys, social workers, peer parent advocates, and investigators;
- **Contract or panel systems of representation:** a panel of contract attorneys who meet education requirements and mandatory practice standards, are compensated for out-of-court work, and who have access to social workers, investigators and experts; and
- **Hybrid parent representation offices and contract/panel systems:** a panel or list of contract attorneys who handle the majority of the parent representation, and a state or county office with full time staff who may handle some direct parent representation, oversee admission onto the panel, provide and oversee attorney education, and administer an attorney review process.<sup>20</sup>



In both 2011<sup>21</sup> and 2015,<sup>22</sup> the ABA surveyed states to learn how different models of parent representation are funded with similar results. The 2015 study presented the following findings.

- Payment on an hourly basis (51%)
- Salaried through an organization (37%)
- Annual or periodic contract (26%)
- Per case (17%)
- Per hearing/event (9%)
- Other: (9%)<sup>23</sup>

Despite the different models and payment methods, a review of models of representation used across the country, published academic literature, and the recommendations of national standard-setting agencies, highlights the following characteristics of parent and child representation systems that promote quality representation:

- Mechanisms or models that control attorneys' caseloads are one of—if not the—most important components of strong models of parent and child representation.<sup>24</sup> Moderate caseloads and caseload limits give attorneys sufficient time to meet with and counsel their clients, attend out-of-court meetings, and prepare for court hearings, all essential components of quality representation.
- Directly related to caseload control is the need for cost effective and cost efficient funding mechanisms that account for the actual amount of work it takes to manage a complicated dependency caseload.<sup>25</sup> National experts report that ineffective funding models and obstacles to adequate funding "result in parents not always receiving the high quality representation they need to ensure the best outcomes for their children and families."<sup>26</sup>
- In comparison to county-administered programs, state-administered models better promote consistent practice across the state.<sup>27</sup> The 2015 ABA Center study found that in 39% of states funding is state administered, in 15%, funding is county administered, in 2%, funding is administered by judicial district, and 44% of states have hybrid funding systems.<sup>28</sup>
- Continuity of representation for parent and child clients—where a client has one attorney from before the shelter hearing through reunification or permanency (i.e., throughout the life of a case)—yields better results and promotes procedural justice.<sup>29</sup>
- National best practice models for parent and child representation include attorney access to, and use of, multidisciplinary staff, including social workers, investigators, and parent mentors.<sup>30</sup> In 2015, the ABA Center assessed the availability of multidisciplinary staff to parents' attorneys across the country and found states, law firms, and defense offices moving toward multidisciplinary models: 16% of respondents had access to parent mentors, 34% had access to social workers, 25% had access to investigators, and 25% had access to other types of support.<sup>31</sup>
- Research and national best practice models highlight the value and role of institutional parent and child representation offices, whether governmental or non-governmental, these offices provide important opportunities to regulate the quality of practice within their organizations and to provide training, consultation and leadership among the attorneys representing parents and children across a jurisdiction.<sup>32</sup>
- Pre-petition attorney representation is a promising new practice that is gaining national attention. In jurisdictions where pre-petition representation is available, parents and children are provided attorneys when the state first engages with the family and signals that there is a risk of potential future removal, even if this is before court involvement. Initial data and analysis find that pre-petition representation can be an important tool for strong models of parent and child dependency representation.<sup>33</sup>

- Providing attorneys to work with parents (and in certain instances, children) on collateral issues that may affect the dependency case (such as custody, divorce, housing issues, etc.) is a component of quality representation often found in the most successful national models of parent representation.<sup>34</sup>

It was in light of these findings on national models and model attributes that the Task Force assessed Oregon's current model for parent/child representation.

#### B. The Model of Parent/Child Representation in Oregon

The Office of Public Defense Services, a state agency, enters into two-year contracts with local entities for the provision of public defense services. The local entities may be law firms, non-profit public defenders, or consortia groups. All contracts for juvenile dependency representation, with the exception of the Parent Child Representation Program (three counties are currently participating in the PCRCP program described above- Linn, Yamhill, & Columbia), are based on the case credit model. The case credit model has been the primary contracting model since the early 1980's when the State Court Administrator's office assumed statewide responsibility for appointment of counsel in public defense cases.

In juvenile dependency cases, most contractors receive a case rate that covers the period from appointment through the establishment of jurisdiction until the first post-dispositional hearing (approximately, the first six months of the case). Thereafter, contractors are paid only for review hearings, including permanency hearings and Citizen Review Board hearings, or when appointed on the filing of a termination of parental rights (TPR) petition.

In this model, non-profit public defender offices and some law firms provide investigative services to their attorney employees through staff investigators. Attorneys at non-profit public defender offices follow office protocols to access investigative resources. Attorneys who are part of a consortium and most law firm attorneys access investigator funds through the OPDS non-routine expense request process. To qualify for funding for investigation, the attorney must submit documentation to OPDS showing that the resource is both necessary and reasonable. OPDS reviews these requests and authorizes funding when the necessary and reasonable threshold is met.

The total number of juvenile dependency case credits for proceedings handled by attorneys representing parents and children in 2014 was:

- Appointment through disposition: 7,535
- Post-dispositional proceedings: 39,973
- TPR proceedings: 1,038

Average Contract Rates (for the 2016-2017 contract cycle)<sup>e</sup>:

- Appointment through disposition, dependency: \$830
- Post-dispositional proceeding, dependency: \$339
- TPR proceeding: \$2,711

The total budget for juvenile representation in 2015/2017 was \$52 million. That amount provides minimal compensation for over 300 attorneys representing parents and children across the state of Oregon and provides modest additional resources for investigators, experts, and litigation support as needed.

#### C. Attributes of a Quality Parent/Child Representation System

The Task Force reviewed models of representation used across the country, surveyed published academic literature, investigated the recommendations of national standard-setting agencies, and examined successful strategies of parent/child representation used in Oregon in order to identify ten attributes of quality systems of parent/child representation. Four of these attributes were deemed critical to improving

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<sup>e</sup> This contract rate is intended to cover all costs of representation (attorney compensation and benefits, staff salary and benefits, and overhead).

Oregon’s dependency representation model. These attributes, identified below, guided the decision-making process that led to the ultimate recommendation of the Task Force.

<b>Priority attributes for high quality representation:</b>
<b>Availability-</b> Attorneys have sufficient time to meet the needs of clients, the court and other stakeholders. This promotes good client-directed legal work, client engagement in the dependency process, and more efficient case resolution.
<b>Consistency-</b> Oregon families receive consistent standards-based, competent legal representation. Quality assurance and accountability are present.
<b>Manageable Caseloads-</b> Attorneys are not overburdened and have the time and resources to adequately prepare for court and provide strong advocacy in and out-of-court. This promotes better legal work and timely resolution of dependency cases.
<b>Outcome-Oriented Practice-</b> The model has been shown to play a role in the larger child welfare system that improves outcomes for children and families. Stakeholders in the dependency system must not only do their utmost to fulfill their distinctive roles but must all work collectively (where legally possible and feasible) toward the common goal of improved outcomes for Oregon children and families.
<b>Attributes also important to high quality representation:</b>
<b>Continuity-</b> Consistent legal representation throughout the life of a case and throughout a client’s involvement with the juvenile court system (one lawyer- one client). This is a best practice and supports a better attorney-client relationship for parents and children.
<b>Cost-Effective/Cost-Efficient -</b> Cost-effective services ensure that funds are spent to support necessary value-added services that protect the rights of children and parents. Cost-efficient services ensure that legal services are being provided in a manner that takes advantage of available economies of scale, process efficiencies, and technological advances, in addition to decreasing unnecessary transaction costs. These attributes collectively ensure that quality legal services are provided without excessive cost.
<b>Local Community Connection-</b> Attorneys are located in the community, know local practitioners, and have strong working relationships with the local court, DHS caseworkers, and service providers. This enables attorneys to be culturally responsive, understand community values, and understand effective local practice.
<b>Multidisciplinary Representation-</b> All lawyers have access to investigators, experts, and to teams of practitioners that engage and support parents and children, including case managers and peer mentors. Lawyers have access to adequate staff support, such as paralegals. Access to a multidisciplinary team ensures that parents’ attorneys are able to focus on representing their client, have the expertise necessary to build strong cases, and have the support to engage in case plans and court orders.
<b>Duration of Representation-</b> Attorneys are available pre-petition. The availability of attorneys for parents and children pre-petition protects parents and children’s due process rights, promotes the most appropriate state interventions, and maximizes the efficient use of judicial resources. Attorneys are available for children in voluntary substitute care placements. Attorneys are only appointed once for the duration of a case from pre-shelter hearing through TPR, should TPR occur.

**Scope of representation-** Appropriate performance standards suggest that lawyers representing children should, when necessary, expand the scope of representation either personally or through an appropriate referral on issues which do not specifically arise from the court appointment. Lawyers for parents should be aware of collateral issues and, to the extent possible, counsel the client on advocacy options. This promotes strong attorney-client relationships and promotes timely resolution of the corresponding dependency cases.

## 2. Recommendations

**Recommendation: Expand workload model of contracting with case cap (PCRCP) to all counties in Oregon.** The Oregon State Legislature should allocate the funding necessary for the Public Defense Services Commission to adopt a workload model of contracting with a caseload cap (similar to the PCRCP model currently in place in Yamhill, Linn, and Columbia County and the model adopted for parent representation in the state of Washington) for all counties in Oregon.

The PCRCP, an Oregon model based on national best practices, has already been established in three counties and has shown first-hand how a workload contract model for public defense services in juvenile dependency proceedings can improve practice, promote better child welfare outcomes, and offer opportunities for long-term cost savings. Additional investment in the OPDS budget will provide adequate funding to continue rollout of the PCRCP. This investment will give OPDS the means and structure necessary to repair its outmoded parent and child contracting model to address the associated structural issues, ultimately ensuring that parents and children receive the attention and legal services they need in these important cases.

# Government Representation

## 1. Findings

The child welfare system is an amalgam of social work and law. For this reason, a clear definition of the social work and legal roles in dependency cases is necessary to best promote and achieve social services goals, effectively educate the court, and work with children and families.<sup>35</sup>

It has been well documented that there is a deep, inherent division between the fields of social work and law, and between social workers and attorneys. Social workers and the agency utilize conciliatory methods, working with the client in a cooperative effort to achieve goals and solve problems for individuals and families. In contrast, attorneys and the courts utilize the adversarial process to find the truth, resolve disputes, and make decisions concerning the parties involved in civil child protection proceeding. This stark difference in approach to resolving problems of individuals and families in the child welfare system can lead to a substantial degree of misunderstanding and miscommunication. When an agency attorney is not present at court hearings, or is present but does not protect or support the social worker in the court process, good social work practice is often forfeited. In the rough-and-tumble arena of an adversarial court proceeding, the social worker is often intimidated by opposing attorneys, both outside and inside the courtroom, and by the judge in the courtroom, into giving up very quickly on well thought-out components of the proposed case plan for the child and the family.<sup>36</sup>

Concerns about the model of representation for the government in dependency cases and its effects on child welfare outcomes in Oregon are well known. The 2013-14 Interim Task Force on Juvenile Dependency Proceedings Final Report summarized these issues:

“The lack of consistent legal representation of DHS Child Welfare in court is another contributing factor to permanency delays. DHS caseworkers often appear in court without legal counsel. There is inconsistency among the counties on the role of the district attorney’s office in these cases and in

terms of the type and frequency of appearances by an assistant attorney general. Issues occur when cases are delayed due to DHS caseworkers being unable to adequately address their legal position or present their case.”<sup>37</sup>

Little study has been done on how legal representation is provided for the government in child welfare cases.<sup>38</sup> But initial studies show that attorneys for the agency can play an important role in promoting good outcomes for children and families in the child welfare system.<sup>39</sup> The Task Force, therefore, had to gather data and information on this topic to fill the gaps in the literature.<sup>f</sup>

#### A. Models of Government Dependency Representation across the Country

In an effort to better define the role of the government attorney in dependency proceedings, the ABA Center and national practitioner experts have crafted a set of Performance Standards for Government Attorneys in Child Dependency Proceedings (Standards) designed “to improve the quality of child welfare agency representation and uniformity of practice throughout the country.”<sup>40</sup> These standards define an agency attorney as “[a]n attorney who is an employee or contractor with the government who is charged with the responsibility of initiating proceedings on behalf of the government or the people to protect abused and neglected children.”<sup>41</sup> In the standards, the ABA Center summarizes the two basic models of government representation as follows:

*“Agency Representation Model: Under this model, the agency attorney represents the agency as a legal entity, much the same as in-house counsel’s role in representing a corporation. The attorney could be an employee of the agency or of another governmental body, but the agency is clearly the defined client. Some of the benefits of this model include:*

- *reliance on the agency’s familiarity with a child and family in decision making;*
- *value placed on the agency’s expertise in making decisions regarding the safety, permanency, and well-being of children and on the lawyer’s legal expertise in legal matters;*
- *consistent decision making and interpretation of laws;*
- *legal action supported by caseworker opinion, thus boosting caseworker credibility in court, for example, in deciding when to file an initial petition; and,*
- *the attorney is very familiar with the agency and its practices and policies.*

*One drawback to this model is that caseworkers may believe the attorney represents them personally rather than the agency as a whole. While in practice this may generally be true because the caseworker is the voice for the agency in court, the agency attorney must clearly communicate that he or she represents the agency as an entity and should use a conflict resolution system when the caseworker’s opinion varies from agency policy or the attorney has reason to question the caseworker’s decision.*

*Prosecutorial Model: Under this model, an elected or appointed attorney (or the attorneys working for this individual), often a district attorney or county attorney, files petitions and appears in court on behalf of the agency, and represents the state or “the people” of the jurisdiction. This may mean the elected attorney may override the views of the agency in court. One positive aspect of this model is that the attorney may be more in tune with the wishes and beliefs of the community and how the community feels about handling child welfare cases. Concerns with this model include:*

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<sup>f</sup> In consultation with national experts the Task Force staff, designed a survey distributed to all 50 states; 31 states responded. Task Force staff then followed up this survey with formal structured interviews with managing government attorneys in five states that had been identified by court improvement administrators as having effective systems of government representation. The results of this work are cited throughout this report. at 14. See TASK FORCE ON LEGAL REPRESENTATION IN CHILDHOOD DEPENDENCY, GOVERNMENT ATTORNEY STRUCTURED INTERVIEWS (2016) available at [http://www.oregon.gov/gov/policy/Documents/LRCD/Meeting8\\_051116/Alternative\\_Models\\_Materials/State\\_Attorney\\_Manager\\_Interview\\_Results.pdf](http://www.oregon.gov/gov/policy/Documents/LRCD/Meeting8_051116/Alternative_Models_Materials/State_Attorney_Manager_Interview_Results.pdf);

- *the caseworker is often the only party in court without an attorney speaking for him or her;*
- *the caseworker's expertise may be ignored, as the attorney has the ultimate say;*
- *the attorney may be handling all the business for the community and therefore not be able to specialize in child welfare law;*
- *political agendas may play a large role in decision-making;*
- *the agency as a whole may not be getting legal advice on policy issues;*
- *the attorney's personal beliefs about issues such as permanency rather than caseworker expertise dictate what will happen for a child; and,*
- *potential conflicts of interest may arise, such as when the prosecutor is pursuing delinquency petition against a child who is in the agency's custody.*<sup>42g</sup>

In conjunction with these descriptions, the ABA Center provides the following commentary:

*"No matter what model of representation, it is essential that the agency attorney and agency communicate clearly about which model applies. Each should understand who makes the ultimate decisions in different circumstances and there should be a method for resolving a decision making conflict, should it arise. In each model, there will be times when decision-making roles are unclear and open communication is essential. The agency attorney and agency should understand the attorney's role and responsibilities concerning advising and protecting the agency on liability issues.*

*Additionally, no matter which representation model is used, the agency attorney must understand his or her role with respect to private agencies with whom the agency contracts. The most important issues are that children are safe, their needs are met, and their families are treated fairly.*

*The drafting committee of these standards recommends the agency representation model. However, state legislation may dictate what model each attorney must follow. States are cautioned against developing hybrid models which incorporate elements of both the agency model and the prosecution model of representation because of the inherent risks of conflict such hybrid models could create for attorneys. These standards apply to all agency attorneys, no matter what model they use for representation.*"<sup>43</sup>

The excerpt and commentary from the ABA Standards is consistent with the findings of the few assessments and scholarly reviews of agency representation that have been completed in the last two decades.<sup>44</sup> Of note is the only empirical study completed on government agency models. This 2003 study compared two models for representing the government. In one model, assistant district attorneys represented the state, and in the other model "project attorneys" were employed to represent the agency.<sup>45</sup> The study found that when the agency was represented by project attorneys, there were consistently more court hearings, and case workers were well prepared for these hearings.<sup>46</sup> This finding is significant because complementary studies find that a higher frequency of judicial involvement is a predictor of quicker case resolution (reunification or TPR occur more quickly with increased judicial oversight). Thus, (1) the degree of judicial engagement and (2) whether the attorneys were DAs or project/agency attorneys, were the most important factors in determining how quickly cases proceeded when the agency sought TPR. In counties where the court was active, there was no significant difference in time to TPR/permanency. However, in counties where the court was not particularly engaged in child welfare cases, the project/agency attorneys helped achieve TPR/permanency 250 days sooner than DAs.<sup>47</sup> The study did not find any other statistically significant differences in case outcomes tied to the attorney representation model; however, the results showed that case workers overwhelmingly preferred the

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<sup>g</sup> The Task Force acknowledges that the form of practice by DAs throughout Oregon is not necessarily consistent in all respects and that the ABA 2004 report cited here, does not necessarily accurately describe the Oregon practice in all counties.

project attorney model over the DA model, because they developed better relationships with the attorneys and therefore received more help and guidance as they managed their cases.<sup>48</sup>

In 2009, the ABA Center conducted the most comprehensive review of state government attorney practice to date.<sup>49</sup> Of the 45 jurisdictions which responded to the question of how the state organizes representation for agency attorneys, "80% (36 of 45) of the jurisdictions reported that the agency attorney represents the agency and 20% (9 of 45) that they represent 'the people.'"<sup>50</sup>

In October 2015, staff for this Task Force updated the ABA Center survey. The majority of the 31 states that responded use an agency model. The specific results were fairly consistent with the 2009 ABA Center study:

- Agency Representation: 26 (83%)
  - In-House Counsel: 7
  - Attorney General's Office: 9
  - District or County Attorney's Office<sup>h</sup>: 7
  - Mixed Model by County (DA/AG/In-House/Contract): 3
- Prosecutorial Representation: 3 (10%)
  - District/County/Prosecuting Attorney's Office: 3
- Hybrid Systems (½ Case Prosecutorial/ ½ Case Agency): 2 (7%)
  - District Attorney then Attorney General's Office : 2

Of the 26 states that defined their model as an "agency model," 8 reported either that the state was the agency (that these roles could not be bifurcated) or interpreted their state's authorizing statute for government representation to include a dual mandate (a requirement that state attorneys both represent the agency and also protect the well-being of the children or "the people" in the state).

This survey found that funding mechanisms across these jurisdictions varied with the most common mechanisms being a flat fee transfer from the agency to the legal provider or individual county funding:

- Child Welfare Budget Line Item (either for in-house counsel or flat fee transfer to legal service provider): 11 (35%)
- Attorney General Budget Line Item: 4 (13%)
- Attorney General Bills Agency by Hour: 4 (13%)
- District/County Attorney Budget<sup>i</sup>: 12 (39%)

Regardless of the model, payment method, or entity providing services, studies of successful models for government representation described by national standard-setting agencies and seen nationwide highlight the following key aspects:

- Consistent, continuous, and comprehensive legal representation forms the foundation of good government representation under the ABA Center standards. The standards require government attorneys to (1) protect and promote the agency's credibility,<sup>51</sup> (2) advise and counsel the agency on all legal matters,<sup>52</sup> (3) prepare or review the initial petition and all subsequent pleadings,<sup>53</sup> (4) be prepared and present at all hearings,<sup>54</sup> (5) promote timely hearings and avoid unnecessary continuances,<sup>55</sup> and (6) review court orders with the agency to ensure accuracy and clarity and ensure agency compliance.<sup>56</sup> All of the states that Task Force staff interviewed described consistent, continuous, and comprehensive systems of representation where one entity represented the state in the majority of cases, most attorneys carry cases from start to finish, and attorneys provide advice and counsel to the agency on all legal matters.<sup>57</sup> Further, these

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<sup>h</sup> This was more frequent in states that have county-administered child welfare programs than those with state administered programs like Oregon.

<sup>i</sup> This was more frequent in states that have county-administered child welfare programs than those with state administered programs like Oregon.

interviews found that: “All of the states had ‘open door’ policies where case managers were encouraged to reach out to attorneys at any time and for any reason. Each state reported that this practice promoted lawful case decisions and saved the agency, and the attorneys, substantial time and money by preventing unnecessary mistakes and improving case decisions.”<sup>58</sup>The Task Force survey found that only three of 31 states regularly allow caseworkers to attend court hearings without an attorney present, only two of 31 states switch legal entities representing the government mid-case, and only three states use different legal entities to represent the agency in different counties.<sup>59</sup>

- Attorney availability to case workers is essential to a strong system of representation and a well-functioning dependency system. The government attorney’s “job extends beyond the courtroom. The attorney should be a counselor as well as litigator. The [government] attorney should be available to talk with caseworkers to prepare cases, to provide advice about ongoing concerns, and provide information about policy issues. Open lines of communication between attorneys and caseworkers help ensure that caseworkers get answers to questions and attorneys get the information and documents they need.”<sup>60</sup> The importance of attorney availability was a frequent focus of comments from managing attorneys from other states. Interviewees noted that attorney availability decreased conflicts and built an “important friction” into the attorney-agency relationship that ensured that the decisions made in a case balance the best social work practice with the requirements of the law—leading to better outcomes for children and families.<sup>j</sup> Additionally, as mentioned above, caseworker satisfaction has been shown to improve with access to representation which has the potential to reduce costly case worker turn-over.<sup>k</sup>
- Manageable caseloads lead to good legal practice, strong attorney-agency relationships, and therefore a quality system of representation. The U.S. Department of Health and Human Services (USDHHS) recommends that the government attorney be responsible for no more than 100 *children*,<sup>61</sup> and the ABA Center recommends no more than 60 *cases*.<sup>62</sup> In the Task Force interviews, managing attorneys described caseloads that ranged from 40 to 250.<sup>63</sup> Managers described lower caseloads for attorneys who had to travel long distances to attend court hearings and/or staff cases with agency workers. High caseloads were considered a big challenge to quality representation and were most frequently described as the product of inadequate states budgets.

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<sup>j</sup> As described by one attorney manager:

“Our model has huge pluses- it really almost compels close interaction between the attorney and the case worker. Working hand in hand creates an important friction. It is a forced marriage of the legal requirements with social work practice, forcing careful work with children and families. Our boss is our client, so it has this built-in tension because we are still beholden to professional responsibility (our attorneys must certify that a petition is in the best interest of the child as a legislative requirement) and the wishes of the client. Thus, attorneys and social workers are forced to come together. This friction is structural and it works very well – the relationship can’t be ignored or dismissed, and the friction is very constructive.”

See TASK FORCE ON LEGAL REPRESENTATION IN CHILDHOOD DEPENDENCY, GOVERNMENT ATTORNEY STRUCTURED INTERVIEWS 13 (2016) available at

[http://www.oregon.gov/policy/Documents/LRCD/Meeting8\\_051116/Alternative\\_Models\\_Materials/State\\_Attorney\\_Manager\\_Interview\\_Results.pdf](http://www.oregon.gov/policy/Documents/LRCD/Meeting8_051116/Alternative_Models_Materials/State_Attorney_Manager_Interview_Results.pdf).

<sup>k</sup> One study found that:

“In all counties, the agency social workers who worked with both the local assistant prosecutors and the project attorneys [representing the agency] overwhelmingly favored the project model....When asked who helped the most, the social workers in all counties overwhelmingly designated the project attorneys, with no social worker choosing the local assistant prosecutors. Therefore, even though the project attorneys aggressively and candidly advised the social workers in an effort to get them to make timely permanent placement decisions, the close team relationship formed between the two types of professionals allowed the project model to be perceived very positively by the agency social workers.”

David J. Herring, *Legal Representation for the State Child Welfare Agency in Civil Child Protection Proceedings: A Comparative Study*, 24 U. TOL. L. REV. 603, 673-74 (1993).



- Cost effectiveness and cost efficiency are key to supporting a better child welfare system as a whole.<sup>64</sup> Cost-effective and cost-efficient systems are systems that not only have adequate resources, but also have predictable budgets.<sup>65</sup> Managing attorneys interviewed stressed that an advantage of block grant funding is that caseworkers never felt restrained from requesting legal advice and counsel.<sup>66</sup> Alternatively, cost-effectiveness may be improved when the same attorney has both civil and criminal authority. "This structure has the potential to preserve tremendous resources in terms of time, energy, manpower, and supplies, as well as to reduce the processing time of each respective case," when consideration of relevant ethical standards is taken into account.<sup>67</sup>
- Local community connection brings an important perspective into the courtroom.<sup>68</sup> Managing attorneys surveyed by the Task Force staff agreed that local community connection is important to effective government representation. They described their offices locations as in or near to the communities, agency offices and courts where they regularly appeared.<sup>69</sup> The Task Force survey found that nationwide, most government attorneys in child welfare proceedings are located near the judicial districts in which they practice.<sup>70</sup> Further, when agency attorneys were not also district attorneys, surveys and interviews indicated they were often co-located with the agency to save costs and to promote local community connection.<sup>71</sup>
- Services and outcomes for children and families are improved when the representing attorney knows the mission, values, and policies of the agency. Studies indicated improved outcomes when attorneys work for the agency.<sup>72</sup> Further, managing attorneys in the Task Force survey indicated that working toward the common goals of safety and permanency improve services and outcomes for children and families.<sup>73</sup>

#### B. Current Model of Representation in Oregon

The current model of government representation in dependency proceedings in Oregon is a hybrid model. DAs represent "the state" at jurisdictional hearings in the majority of counties. Although, in the majority of counties, DA do not attend shelter hearings, in approximately 60% of the counties, DAs either write or review petitions. Some DAs also consult with DHS on cases that have not yet been filed. DAs do not have an attorney-client relationship with DHS. As the sole exception, the Multnomah County DA has an intergovernmental agree (IGA) to litigate TPR trials.

The variance in practices, staffing, and budgets makes it impossible to determine an "average caseload"; however, data collected shows that attorneys are likely managing well above the ABA Center recommended 60 to 80 cases at any given time, understanding that these cases are short in duration (it takes between 60 to 120 days on average to achieve jurisdiction).

DAs are funded through a limited supplemental grant program, Title IV-E reimbursement contracts, and a Multnomah specific TPR IGA. Twenty-one DA Offices have Title IV-E agreements with DHS, and in the last biennium 18 collected the reimbursement funds associated with these agreements. The amount reimbursed varied greatly from \$1,340 in Curry County to \$614,800 in Multnomah County each biennium. Twenty-one DA Offices accepted the supplemental grant funding via an intergovernmental agreement (IGA) with DHS last biennium. The amount granted varied from \$4,399 in Grant County to \$455,752 in Multnomah. Multnomah currently receives \$2.6 million dollars for the TPR IGA.

DOJ has a formal attorney-client relationship with DHS (as with every state agency). DOJ therefore, consults with DHS as necessary on all cases and represents the agency in the courtroom in various motion hearings, contested review hearings, contested permanency hearings, guardianship and TPR trials in all counties (except TPR trials in Multnomah). In addition, DOJ represents the agency in shelter hearings in four counties, jurisdictional trials in three counties, and the majority of all review and permanency hearings in nine counties. DOJ handles jurisdictional trials statewide when the DA identifies a conflict or elects not to appear on the petition. DOJ provides legal "file reviews" on every case where a child has been in foster care for five months and again after the child has been in care for 11 months. DOJ also

represents the agency on all auxiliary issues related to dependency cases (including *inter alia*, foster care certification, licensing, Interstate Compact on the Placement of Children, and paternity), assists with legislation, administrative rules, and the interpretation and implementation of statutes, rules, policies, and procedures statewide. Finally, DOJ represents DHS on all related legal administrative actions (including certification of foster homes administrative hearings, adoption assistance administrative hearings, and Child and Adolescent Needs and Strengths (CANS) cases) and consults with attorneys in other divisions of DOJ that represent DHS in matters related to or stemming from the dependency case (Trial Division, General Counsel and Appellate) to ensure statewide consistency. DOJ average caseloads depend on the level of representation provided in a county, but attorneys are typically managing above the ABA Center recommended 60-80 cases.

For all of these services, DOJ bills by the hour at the following rates for the 15/17 biennium: Assistant AG- \$175/hr; Investigator- \$96/hr; Paralegal- \$116/hr; and Law Clerk- \$55/hr.

DHS has 24 paralegals working in all but one of DHS's 16 district offices. Seven of these are job share positions, making the actual total 19 full-time equivalent (FTE) paralegals. The current role of these paralegals varies from assisting with petitions, fulfilling public record requests, and/or coordinating staffings with DOJ attorneys. These paralegal positions are not supervised by attorneys and are limited in what they can do. Paralegals, like DHS caseworkers, cannot engage in the practice of law.

The total state budget for government representation in the 2015-2017 biennium was \$38.4M, consisting of DHS general funds and federal dollars leveraged to fund the DAs, the DOJ, and DHS paralegals. This total does not include individual county contributions for the work of DAs.

C. Attributes of a System of Quality Government Representation

The Task Force reviewed models of representation used across the country, surveyed the academic literature, and investigated the recommendations of national standard-setting agencies to identify nine attributes of quality systems of government representation. Four of these attributes are deemed critical to the improvement of Oregon's dependency representation model for the government. These four attributes, described below, guided the decision-making process that led to the recommendation presented below.

<b>Priority attributes:</b>
<b>Availability-</b> Attorneys have sufficient time and ability to meet the needs of DHS and the court. When attorneys are readily available, it is easier for case managers to seek input from legal counsel, make collective decisions, and schedule court hearings in a timely manner. Attorney availability guides lawful practice in and outside court. This promotes better DHS decision making, more efficient case resolution, and decreased DHS liability risk.
<b>Consistency-</b> Families across the state of Oregon receive consistent standards-based, competent legal representation. Quality assurance and accountability are present.
<b>Cost-Effective/Cost-Efficient-</b> Cost-effective services ensure that funds are spent to support necessary value-added services that protect the agency and promote lawful practice. Cost-efficient services ensure that legal services are provided in a manner that takes advantage of available economies of scale, process efficiencies, and technological advances, in addition to decreasing unnecessary transaction costs. These attributes collectively ensure that quality legal services are provided without excessive cost.
<b>Outcome-Oriented-</b> The model has been shown to play a role in the larger child welfare system that improves outcomes for children and families. Stakeholders in the dependency court system must not only do their utmost to fulfill their distinctive roles but must work collectively (where legally possible and feasible) toward the common goal of improved outcomes for Oregon children and families.

### Remaining attributes important to high quality representation:

**Comprehensiveness-** Resolution of dependency cases often requires the management of numerous corresponding legal issues (e.g., SSI, ICPC, paternity, etc.). These services are necessary to ensure the best possible outcomes are reached in a timely manner.

**Continuity** – One attorney (or legal entity) handles a case from petition to permanency. This promotes efficient and careful practice, best supports caseworkers, and is a national best practice.

**Local Community Connection-** Attorneys are located in the community, know local practitioners, and have strong working relationships with the local court, DHS caseworkers, and service providers. This enables attorneys to understand community values and engage in effective local practice.

**Manageable Caseloads-** Attorneys are not overburdened and have the time and resources to adequately prepare for court and provide strong advocacy in and out-of-court. This promotes better legal work and timely resolution of dependency cases.

**Objectivity-** Attorneys have the ability to provide objective legal advice and counsel to client agency. This promotes lawful practice while allowing caseworkers to focus on best social work practice and improved outcomes.

## 2. Recommendation

**Recommendation: DHS should enter into a block grant or flat fee agreement with DOJ for full agency representation from petition to permanency.** The Oregon State Legislature should allocate funding to DHS so that it can leverage federal grant and reimbursement programs and enter into a flat fee or block grant agreement with the DOJ for comprehensive agency representation from petition to permanency in dependency cases. Additionally, the Oregon State Legislature should grant position authority to DOJ for the additional attorneys and staff required to implement this model.

Historically, DOJ’s billable hour model has been considered cost-prohibitive in juvenile dependency cases and has been a deterrent to DHS accessing and utilizing DOJ for full representation—including attendance at all hearings, regular case consultation, impromptu legal advice, and regular participation in case worker training, meetings, and staffings. A block grant model will allow DOJ to manage cases according to a workload method of case assignment with each DOJ attorney carrying a consistent number of weighted cases. In this model, each dependency case is assigned to an attorney who handles it from petition to permanency. This case assignment method will provide DHS caseworkers with continuous representation which, in turn, will promote attorney-caseworker collaboration, improve caseworker job satisfaction and retention, avoid the risk for unlawful practice of law by case workers, and improve the overall efficiency and cost-effectiveness of the system.

Where DHS has had a unique historic intergovernmental agreement with a DA’s office to litigate TPR trials, such as Multnomah County, and where that DA is willing to provide full representation of the Agency from petition to permanency, DHS under this model should be allowed the option, should the DAs office be interested, to contract with that office for services in lieu of DOJ, provided that certain conditions are met. **In addition, nothing in this recommendation should be construed to eliminate “the state” as a party in dependency cases. DAs interested in continuing their unique role representing the state (“the people” as opposed to the agency) at the jurisdictional phase of dependency cases are encouraged to do so. However, limited DHS funds should be allocated to provide full representation for the agency.**

# Representation for Court Appointed Special Advocates (CASAs)

Separate from the work of the alternative models subcommittee, but related to models of representation in the Oregon dependency system, the Task Force considered the matter of legal representation for Court Appointed Special Advocates (CASAs):

## 1. Findings

Federal law requires that the best interests of every child in dependency proceedings be represented through a guardian *ad litem*.<sup>74</sup> A volunteer Court Appointed Special Advocate (CASA) may serve that role and Oregon relies on CASAs to fulfill this federal requirement.<sup>75</sup> Oregon law designates each CASA volunteer as a legal party to the dependency case, with full rights to participation in juvenile court proceedings, and liberal access to information relating to the child.<sup>76</sup>

CASAs are volunteers who receive 35 hours of pre-service training in the child welfare and juvenile court systems. The training focuses on their role in helping children achieve safe, sustainable permanency; preferably with their own parents when possible. CASAs are supported by supervisors who, in most instances, have personal experience in child welfare, juvenile court, or other child-serving professions.

CASAs commit to at least two years of service involving five – 20 hours each month. CASAs most frequently remain as advocates until case closure or when permanency is achieved. In 70% of cases, children have one advocate for the duration of their case. CASAs meet with their assigned children at least monthly and investigate the child's circumstances by interviewing parents, other family members, school personnel, and other community partners providing services to the family. CASAs report to the court through written reports and oral testimony at all dispositional, review, and permanency hearings. CASAs use information gathered during investigation and ongoing contact to facilitate positive outcomes for children outside of court through direct advocacy with DHS, schools, and other community providers. Well trained and supervised CASAs provide important high quality advocacy for children, and can be as effective as attorneys or law students with similar levels of training and supervision.<sup>77</sup>

Twenty-three county-based non-profit organizations recruit, train, and support Oregon CASAs. All programs must be in substantial compliance with the *National CASA for Children Program Standards*. These standards include the requirement that CASA programs provide access to legal counsel "as needed to assist in performing the duties assigned to the volunteers by the courts."<sup>78</sup>

### A. Current Model of Representation

Currently, CASA for Children (serving Columbia, Multnomah, and Washington counties) is the only Oregon CASA program meeting this standard. Because volunteers are directly supervised by staff with expertise in juvenile court or child welfare systems, CASA for Children uses a Program Attorney model. In this model, the attorney provides legal consultation and training, along with occasional in court representation. Most legal needs are met without formal appearances by the attorney. The Program Attorney (1) is on-call to the program, allowing for rapid access to legal services; (2) participates in pre-service and on-going training for staff and CASAs; and (3) assists with systemic program issues. Providing adequate legal consultation increases the effectiveness of CASA advocacy.

CASA programs without legal counsel report difficulty performing relatively simple legal tasks: initiating requests for court review, responding to subpoenas for CASA testimony, and preserving CASA recommendations and findings in court records. Programs also report challenges with other advocacy needs that generally are accomplished with legal consultation: interpreting new case law or statutory changes, developing strategies for advocacy outside of juvenile court proceedings that require

understanding of administrative law, and continuing to provide meaningful advocacy in complex juvenile court proceedings.

## 2. Recommendations

**Recommendation: Provide funds sufficient to support four statewide CASA Program Attorneys so that CASAs in Oregon have timely access to legal consultation and representation.** Oregon’s state administrator for general fund CASA appropriations should create standards and contracting procedures to manage legal services contracts for CASA programs through the Oregon CASA Network. To improve advocacy and bring programs into compliance with national standards, CASA programs should have access to legal counsel experienced in child welfare and juvenile court advocacy to provide consultation, limited direct representation, training, and consultation on systemic processes and reforms. Services should be available regionally, and be housed in local CASA programs selected for their capacity to support new personnel and regional accessibility.

## Findings & Recommendations: System Improvement

In order to support the model recommendations described above, the Task Force, through its subcommittees and at the direction of the Legislature, also assessed discrete system areas that affect the overall practice of dependency representation, including: issues with regard to the unlawful practice of law, performance standards, quality assurance and continuous quality improvement measures, and improved crossover case practice. Findings and recommendations with respect to those matters are provided below.

## Preventing the Unlawful Practice of Law

### 1. Findings

#### A. Regulation of the Practice of Law

The discussion about unlawful practice of law (UPL) and representation in childhood dependency proceedings necessarily begins with clarity about which branch of government has the power to regulate who represents parties.

Article III, Section 1 of the Oregon Constitution provides:

“The powers of the Government shall be divided into three separate [sic] departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.”

As a separate branch of government, the judicial branch possesses certain inherent powers necessary to ensure the courts’ functioning. In Oregon, “[n]o area of judicial power is more clearly marked off and identified than the courts’ power to regulate the conduct of the attorneys who serve under it.”<sup>79</sup> Although the Oregon Supreme Court has acknowledged its inherent power to regulate the practice of law, it has also recognized that the legislature has the power to regulate “some matters which affect the judicial process.”<sup>80</sup> The Court has held that, “[t]he limits of legislative authority are reached, however, when legislative action unduly burdens or unduly interferes with the judicial department in the exercise of its judicial functions.”<sup>81</sup>

At the heart of the judicial process is the ability to control judicial proceedings and the parties that appear in front of the court. After all, the court’s power to control who appears before it is “an essential part of the judicial machinery with which it is entrusted by the constitution[.]”<sup>82</sup>

Except in limited circumstances, a person who wants to represent others before a court must be an active member of the OSB.<sup>83</sup> Others may not do so without court permission; for instance, out-of-state attorneys who seek to appear before a court must apply to appear *pro hac vice*.<sup>84</sup>

Although individual parties may appear *pro se* to represent themselves, the state must generally appear through an attorney. Oregon statutes require that “[a]ny action, suit, or proceeding may be prosecuted or defended by a party in person, or by attorney, *except that the state or a party that is not a natural person appears by attorney in all cases, unless otherwise specifically provided by law.*”<sup>85</sup> Under most circumstances, the Attorney General is the legislatively mandated attorney for the state.<sup>86</sup> An exception to this legislative requirement is in place for DHS in dependency proceedings. Temporary legislation passed in 2014 and extended by Senate Bill 222 in 2015 currently provides that DHS “may appear without the Attorney General at: (1) Any hearing held after the hearing required under ORS 419B.305 has been held; and (2) Any proceeding where the district attorney represents the state, provided the positions of the department and the state are not in conflict with respect to issues raised for consideration or determination in the proceeding.”<sup>87</sup> This legislation sunsets in 2017.

Determinations about who should represent the state (e.g. the Attorney General or a District Attorney) are within the purview of the Legislature.<sup>88</sup> Decisions about who *is qualified to appear and represent others before a court* are within the purview of the Judiciary. Attempts to legislate who is qualified to appear and represent others before a court may lead to determinations that “unduly interfere with the judicial department in the exercise of its judicial functions.”<sup>89</sup>

There are significant benefits to having the judiciary determining which individuals are qualified to represent others in court. In particular, the court is able to impose standards on parties who appear before it and does so in order to regulate the practice of law and protect the public.<sup>90</sup> For example, to be admitted to the OSB and have the right to appear and represent others in Oregon courts, a person must pass a bar examination administered by the Board of Bar Examiners to demonstrate basic competence,<sup>91</sup> as well as a character and fitness evaluation.<sup>92</sup> Once admitted, all attorneys must comply with the Oregon Rules of Professional Conduct, which are promulgated by the Supreme Court. The OSB, as an instrument of the judicial department, administers an attorney disciplinary system to enforce compliance with the rules.<sup>93</sup> The Bar also administers a mandatory continuing legal education program for Oregon attorneys so that they maintain basic competence.<sup>94</sup> For these reasons, decisions regarding the lawful or unlawful practice of law or a determination that representation in court by a non-attorney is appropriate fall within the purview of the Oregon Supreme Court, through its rules.

#### B. Defining the Practice of Law

Currently in many Oregon counties, DHS employees draft and file dependency petitions and some write orders and judgments. Additionally, pursuant to the statutes described above, caseworkers across the state frequently appear in court without counsel. This subcommittee has been tasked with assessing which of these actions, if any, when taken by Oregon DHS employees, who are not represented or supervised by counsel, constitute unlawful practice of law.

Case law extensively addresses what constitutes the practice of law. The Oregon Supreme Court has not provided a comprehensive definition of the practice of law but has used the following general definition: “any exercise of an intelligent choice, or an informed discretion in advising another of his legal rights and duties[.]”<sup>95</sup> The Court of Appeals has stated that the practice of law is the “exercise of professional judgment in applying legal principles to address another person’s individualized needs through analysis, advice, or other assistance.”<sup>96</sup> A number of specific acts have been determined to fall within the practice of law.<sup>97</sup> Further, and of particular relevance, in a footnote in *State ex rel. Or. State Bar v. Lenske*,<sup>98</sup> the Supreme Court stated that a lawyer may employ non-lawyers to perform any task except counsel clients about law matters, engage directly in the practice of law, appear in court or appear in formal proceedings

as a part of the judicial process, so long as the lawyer takes the non-lawyer's work, vouches for it, and becomes responsible for it.

Based on existing case law, the Board of Governors of the OSB has defined the unlawful practice of law to include:

"the practice of law, as defined by the Oregon Supreme Court, in Oregon, by a person who is not an active member of the Oregon State Bar and is not otherwise authorized by law to practice law in Oregon; or (2) holding oneself out, in any manner, as authorized to practice law in Oregon when not authorized to practice law in Oregon."<sup>99</sup>

### C. Conclusion

**A model of government representation that provides full representation (where, attorneys continuously represent, advise and appear in court with DHS at every court hearing), for the agency will ultimately prevent unlawful practice of law by DHS employees in the courtroom.** The Task Force has recommended a model that provides for full representation for DHS. However, if DHS should have less than full representation, the Task Force then provides the recommendations as presented below to mitigate concerns about the unlawful practice of law.

## 2. Recommendations

**Recommendation: Should DHS have something less than full representation (where for example, DHS continues to appear without legal counsel at court hearings or where the appearance is limited to certain types of court hearings) the following bundle of recommendations should be implemented to prevent the unlawful practice of law by DHS employees:**

- a) **In order to prevent unlawful practice of law by DHS employees, all petitions, orders, and judgments must be prepared by an attorney or, if prepared by a non-attorney, the attorney must review, and adopt the non-attorney's work by signing the document to be filed with the court.** Preparing legal documents and presenting them to the court are actions that have been determined to be the practice of law. The court has, however, found that non-lawyers may engage in these practices, as long as the lawyer takes the non-lawyer's work, vouches for it, and becomes responsible for it to the client. Thus, requiring attorneys to prepare or review and certify petitions, orders, and judgments should prevent the unlawful practice of law.
- b) **In order to prevent unlawful practice of law by DHS employees, employees who appear in court without an attorney should be sworn in either as a fact witness or, where proper foundation has been established,<sup>l</sup> an expert witness, and present testimony in this role pursuant to the rules of evidence.<sup>m</sup>** Non-attorneys cannot appear in court to advocate on behalf of a client entity without engaging in the unlawful practice of law. Swearing in DHS employees as witnesses clarifies their role in the courtroom, allows for relevant information to be reported to the court, and provides parameters for the information DHS employees present to the court that should prevent the inadvertent unlawful practice of law.
- c) **In order to prevent unlawful practice of law by DHS employees, employees who appear in court without an attorney should not make legal arguments, cite to legal authority, or**

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<sup>l</sup> While this may address the UPL issues, this would not address the DHS employee's ability to be able to respond to cross-examination by other parties' attorneys or understand the implications of their sworn testimony. This also creates inconsistencies statewide as courts do not always follow the same model of questioning the agency or take on the role or assume that responsibility.

<sup>m</sup> While this may address the UPL issues, this would require that DHS employees rely on other parties to lay the foundation for the DHS employee to testify as an experts.

**advocate for a legal position.**<sup>n</sup> It is paramount that DHS employees understand that it is their role to provide evidence grounded in facts and expert social work opinions based on facts, and not directly apply the facts to the law or provide legal arguments. Caseworkers should be counseled about these restrictions and judges should, as necessary, make in-the-moment decisions that guide DHS employees' practice, and to the extent possible prevent the inadvertent unlawful practice of law.

## Implementing Improved Performance Standards for Dependency Practitioners

### 1. Findings

Lawyers in dependency cases "can greatly influence a case, for good or ill, depending on their level of involvement, their training and experience, and the legal standards governing their conduct."<sup>100</sup>

Representing a party in a dependency proceeding is a difficult and emotional job. It is also a job filled with legal complexities, unique ethical considerations, and many responsibilities. Standards can serve an important role in dependency practice: helping an attorney prioritize duties and manage the practice to benefit each client in the attorney's caseload.<sup>101</sup> "[P]erformance standards should serve as a valuable tool both to the new lawyer...and to the experienced lawyer who may look to them in each new case as a reminder of the components of competent, diligent, high quality legal representation."<sup>102</sup>

Systemically, practice standards can "promote quality of representation and uniformity of practice"<sup>103</sup> as well as "improv[e] professional practices and assur[e] timely decisions on permanent placement of children."<sup>104</sup> The ABA Center and USDHHS both recommend that States require a set of performance standards for attorneys in child welfare practice. Both entities also provide model performance standards to aid states in this work.<sup>105</sup> Some states have established formal performance standards that govern the practice of lawyers representing children, parents, and/or the government in child welfare (dependency) proceedings.<sup>106</sup> Oregon is one of these states. Oregon has implemented performance standards for attorneys for children and parents in dependency and TPR cases, as well as for youth in delinquency cases.

In September 1996, Principles and Standards for Defense Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases were approved by the OSB Board of Governors.<sup>107</sup> As the entity that regulates the practice of law in Oregon, OSB was determined to be the most appropriate entity to promulgate and monitor these standards.<sup>108</sup> In 2006, significant changes were adopted to the dependency and TPR standards and, in 2009, an additional set of standards was adopted pertaining to representation in post-conviction cases.<sup>109</sup> In 2012, at the direction of the OSB, two separate workgroups began to meet to work on significant revisions to 1) juvenile dependency and TPR standards for parents and children's attorneys; and 2) adult criminal and juvenile delinquency standards.<sup>110</sup> The work of the Task Force on Standards of Representation in Juvenile Dependency Cases concluded in 2014 with the submission of a report to the OSB Board of Governors that focused specifically on dependency practice and bifurcated the standards for parent representation and child representation into two distinct sets of standards.<sup>111</sup> These standards were loosely modeled on the ABA model standards of practice for attorneys representing children and parents (respectively). These standards represent an important step forward; however, in the time since their issuance practitioners have noted some clerical errors and problematic inconsistencies. Further, local and national expert-practitioners have identified an area of practice (including pre-petition representation and representation of crossover youth) where additional standards may be helpful.<sup>112</sup>

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<sup>n</sup> While this may address the UPL issues, this does not, however, alleviate the concern that the DHS employee may not understand the implications of what to report or how the evidence they are providing may be questioned by the other parties' attorneys, either at the hearing or on appeal.



Although performance standards for government attorneys (both those attorneys who represent “the state” or “the people” and those attorneys who represent “the agency” or DHS) have been discussed and informally considered, Oregon does not have any such formalized standards in place.

## 2. Recommendations

**Recommendation #1: Oregon should have relevant performance standards for juvenile dependency attorneys who represent parents, children, and the government.**<sup>o</sup> These standards should be realistically attainable by practitioners but also be designed to promote best practice. As the entity that regulates the practice of law in Oregon, OSB in coordination with the relevant attorney organizations (e.g., DOJ, OPDS, DAs, and Members of the Oregon Criminal Defense Lawyers Association (OCDLA) juvenile law committee), should generate and revise performance standards. The standards ultimately should be adopted by the OSB Board of Governors. Input from the DHS and representatives from counsel for the other parties should be included in the development or amendment of each of set of standards.

The performance standards generated for government attorneys should, like the standards for parent and child attorneys, use the ABA Center on Children and the Law standards, in this instance [Standards of Practice for Lawyers Representing Child Welfare Agencies](#), as a starting point, and should follow a similar or complementary structure to the performance standards for parent and child attorneys.<sup>p</sup>

The performance standards for parent and child attorneys should be revised to clarify the attorneys and proceedings to which they apply, to appropriately ensure consistency across all sets of juvenile dependency performance standards, to conform to OPDS internal policies, to address clerical errors, and to consider including standards for pre-petition practice and crossover case practice.

**Recommendation #2: Oregon practitioners should be trained in the performance standards relevant to their practice and cross-trained in the performance standards relevant to the practice of the other attorneys in the system.** It is important that performance standards be used as a reference guide or practice manual for juvenile dependency attorneys. Regular trainings for new attorneys and refresher courses for experienced attorneys will promote a deep understanding and use of the performance standards.

**Recommendation #3: Oregon judges should be trained in the performance standards for all juvenile dependency attorneys (parent, child, and government practitioners).** Judges are in a unique position to observe the performance of attorneys. Training on the performance standards will give judges the knowledge necessary to promote and support good practice in their courtrooms.

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<sup>o</sup> It should be noted that in spite of this recommendation, ODAA does not agree to performance standards for DAs. ODAA agrees that quality representation is necessary for all parties in a dependency cases, however, because the model recommended by the Task Force provides no funding for DAs who wish to continue their role representing “the state” (as opposed to DHS) in dependency proceedings. The ODAA would agree to performance expectations and outcomes within the four corners of a grant, but not performance standards accepted and administered by the OSB Board of Governors.

<sup>p</sup> It should also, like the Standards of Representation in Dependency Cases for Parent and Child attorneys, include the following language in the forward:

“These guidelines, as such, are not rules or requirements of practice and are not intended, nor should they be used, to establish a legal standard of care. Some of the guidelines incorporate existing standards, such as the Oregon Rules of Professional Conduct, however which are mandatory. Questions as to whether a particular decision or course of action meets a legal standard of care must be answered in light of all the circumstances presented.”

OR. STATE BAR, REPORT OF THE TASK FORCE ON STANDARDS OF REPRESENTATION IN JUVENILE DEPENDENCY CASES (June 2014), Forward, available at <http://www.osbar.org/docs/resources/juveniletaskforce/JTFR3.pdf>.

**Recommendation #4: Non-lawyers who regularly participate in the juvenile dependency system, such as CRB members, CASA, and DHS workers, should receive training on the performance standards.** It is important for individuals in the dependency system to know the standards and expectations for the attorneys who represent the government, parents, and children in these cases.

**Recommendation #5: Performance standards for all juvenile dependency attorneys (parent, child, and government practitioners) should, to the extent practicable, be incorporated into statewide quality assurance efforts.** Quality assurance efforts should provide an opportunity to formally monitor practitioner proficiency with and fidelity to these standards. Those who draft the performance standards should work closely with the entities in the state dependency system who perform quality assurance work to incorporate these standards, to the extent practicable, into existing and future continuous quality improvement efforts.

## Monitoring Practice and Advancing Outcomes through Continuous Quality Improvement

### 1. Findings

Without essential information, child abuse and neglect systems—and the dependency systems that support them—cannot determine what types of improvements are needed and whether efforts to improve practice are working.

“[E]veryone involved in the protection of children is committed to the goals of safety, permanency, and well-being for every child. However, commitment to these goals is not enough. As stakeholders in whom the public has placed its trust, we must commit to a continuous process of improving and strengthening our dependency system and cross-system supports. Performance measurement is only one step in that process, but it is a critical first step.”<sup>113</sup>

Performance measures, coupled with a quality assurance process, can help systems “establish baseline practices; diagnose what they need to improve; and use that information to make improvements, track their efforts, and identify, document, and replicate positive results.”<sup>114</sup>

Quality assurance measures or performance measures are those specific measureable indicators that “help courts[, representation systems,] and child welfare agencies establish a baseline from which to measure the success of their improvement efforts and to identify areas where improvements are still necessary.”<sup>115</sup> Specifically, the ABA Center has found that performance measures can be used to measure the impact of “rule, policy or practice changes on...representation in a jurisdiction.”<sup>116</sup> They are an integral part of a Continuous Quality Improvement (“CQI”) processes. This process is often described as “identifying, describing and analyzing strengths and problems and then testing, implementing, learning from and revising solutions. Simplified, the model identifies the cyclical steps in a process of systems change—the plan, do, study, act model.”<sup>117</sup> These efforts can improve dependency systems and associated representation models, which, in turn, improve outcomes for children and families in the process.

For these reasons, performance measurement, and other quality assurance efforts, have been used by child welfare agencies for years to establish and gather regular and reliable sources of information that evaluate system performance, aid in decision-making, and report success and challenges to external stakeholders.<sup>118</sup> In 2008, the United States Department of Justice, with partners the National Center for State Courts, the National Council for Juvenile and Family Court Judges, and the ABA Center on Children and the Law, found that “[l]ike child welfare agencies, juvenile and family courts must focus not only on the timeliness of case processing and decisionmaking [sic], but also on the quality of the process and the outcomes resulting from the court’s efforts.”<sup>119</sup> In response, these organizations collectively released a

guide to Court Performance Measures in Child Abuse and Neglect Cases urging courts across the county to engage in quality assurance efforts.<sup>120</sup> Adding to the quality assurance movement, in 2012, Court Improvement Program directors from Region VI of the Children's Bureau discussed the importance of improving representation for parents. That meeting led to the creation, piloting, and eventual publication, in 2014, of Indicators of Success for Parent Representation authored by the ABA Center on Children and the Law.<sup>121</sup> These tools have supported the gathering and reporting of quality assurance measures and continuous quality improvement processes in states and jurisdictions across the country to monitor various aspects of the child welfare system including, in some states, systems of representation.<sup>122</sup>

In Oregon, the Juvenile Court Improvement Program (JCIP) began collecting and reporting timeliness data and system-wide performance measures in 1999. Each quarter, JCIP provides quarterly reports on these measures to all court administrators, presiding judges, juvenile court judges, and court staff. These reports are a periodic reminder to aid local stakeholders in their efforts to improve dependency court practice.<sup>123</sup> Because the problems of children and families involved in the juvenile dependency system cannot be solved by the judicial branch alone, in 2005 JCIP launched the JCIP Model Court Program to foster multidisciplinary, collaborative improvement efforts in our local communities. JCIP provides training on performance measures, facilitated self-assessments, and provided local JCIP model court teams with technical assistance and support to implement continuous quality improvement processes at the circuit court level. In 2014, the OPDS launched a pilot program "The Parent and Child Representation Project" which has created significant system improvements with regard to how children and parents are represented in three counties in Oregon. To track the effect of these systemic changes, OPDS has selected a set of performance measures that it is tracking and has engaged in a continuous quality improvement process.<sup>124</sup> To date, there are no quality assurance efforts that specifically target the district attorney or DOJ systems of representation in Oregon.

The courts, DHS, service providers, and attorneys who represent the government, children, and parents are all involved in dependency cases. Each entity has a different responsibility and plays a different role in the child welfare system.<sup>125</sup> Although each entity is limited in its ability to individually "cause" any given outcome, and the level of influence each entity has on outcomes varies, each has some level of influence and the ability to affect outcomes in these cases.<sup>126</sup> Additionally, the public holds all these entities collectively accountable for the outcomes achieved for children who have been abused or neglected.<sup>127</sup> To date, little has been done in Oregon to examine the impact that attorneys for the government, children, and parents have on any given outcome; however, the PCRCP is beginning to examine the link between parents' and children's attorney performance and case outcomes. Moreover, little data is available in Oregon on basic outputs (measurable realities) of attorneys (parent, child, and government) in the dependency representation system. Consistent and reliable performance data is needed to ensure that Oregon's dependency representation system not only provides efficient and effective legal services to all parties, but also contributes to improving outcomes for and fulfilling the state's responsibility to Oregon children and families.

## 2. Recommendations

**Recommendation #1: The following Quality Assurance Outcome Measures should be collected and reported to assess the effect of the current model of representation and the effect of any changes to the model suggested by this Task Force and implemented by the legislature and the administration.** Although there are additional outcome measures that may be relevant to the representation model or dependency representation system (see appendix A), these priority measures are recommended for collection and use as part of the Continuous Quality Improvement Process (see Recommendation #3) because of their overall importance, ability to provide information about known current systemic issues, and their potential correlation to representation (noting that representation is just one aspect of the dependency system that affects these outcomes). In addition, these measures have been recommended for collection in dependency representation and court systems by national organizations and states that have implemented quality assurance measures for representation systems.

Performance Measure	Indicator	National documents that recommend this performance measure	Is this collected/ reported?
<b>Outcome Measures</b>			
<b>Successful Permanency</b>	Total percentage of children reaching permanency*	ABA Indicators of Success for Parent Attorneys ("Indicators of Success") <sup>128</sup> ; Toolkit for Court Performance Measures in Child Abuse & Neglect Cases ("Toolkit Measures") <sup>129</sup>	Currently Collected and Reported by DHS
	Reunification <ul style="list-style-type: none"> <li>• Median Months to Reunification (FO.02.1)</li> <li>• Percent of cases where permanency found through reunification</li> </ul>	Indicators of Success; Toolkit Measures	Currently Collected and Reported by DHS
	Adoption <ul style="list-style-type: none"> <li>• Median Months to Adoption (FO.02.2)</li> <li>• Percent of cases where permanency found through adoption</li> </ul>	Indicators of Success; Toolkit Measures	Currently Collected and Reported by DHS
	Guardianship <ul style="list-style-type: none"> <li>• Median Months to Guardianship</li> <li>• Percent of cases where permanency found through guardianship</li> </ul>	Indicators of Success; Toolkit Measures	Currently Collected by DHS
<b>Parent and Child Contact</b>	Visitation Between Parents & Children <ul style="list-style-type: none"> <li>• Type</li> <li>• Location</li> <li>• Supervision</li> </ul>	Louisiana Child Attorney Quality Assurance Indicators ("LA Indicators") <sup>130</sup>	Currently Collected by DHS
<b>Timeliness of Hearings</b>	Continuances and set overs <ul style="list-style-type: none"> <li>• Number</li> <li>• Person requesting</li> <li>• Reason</li> </ul>	National Center for State Courts CourTools (with regard to hearings/trials) <sup>131</sup>	Not currently collected

Performance Measure	Indicator	National documents that recommend this performance measure	Is this collected/ reported?
<p>*Although the total percentage of children achieving permanency may increase, it is important to note that permanency outcomes may not necessarily all improve together. Getting more children reunified and into guardianships, for example, might lead to a reduction in the percentage of children who are adopted, nonetheless, this scenario would still be an improvement in overall permanency outcomes.</p>			

**Recommendation #2: The following Quality Assurance Output Measures should be collected and reported to assess the current model of representation and the effect of any changes to the model suggested by this Task Force and implemented by the legislature and the administration.**

Although there are additional output measures that may be relevant to the representation model or dependency representation system (see appendix A), these priority measures are recommended for collection and use as part of the Continuous Quality Improvement Process (see Recommendation #3) because of their overall importance, ability to provide information about known current systemic issues, and their potential correlation to representation (noting that representation is just one aspect of the dependency system that affects these outputs). In addition, these systemic measures have been recommended for collection in dependency representation and court systems by national organizations and states that have implemented quality assurance measures for representation systems.

Performance Measure	Indicator	National documents that recommend this performance measure	Is this collected/ reported?
<b>Output Measures</b>			
<b>Workload</b>	Attorney caseload, separated by case type including, for example dependency, delinquency, child support, criminal, and other. Other commitments by attorneys (e.g., supervising, magistrate commitments) may be recorded as a percentage of FTE.	Indicators of Success	Generally not currently collected.*
	The percentage of cases where one lawyer handles the case from petition to permanency. <ul style="list-style-type: none"> <li>Number of times a different lawyer "covers" the case for a hearing</li> </ul>	Toolkit Measures	Generally not collected.
<b>Continuity</b>	The percent of juveniles with both dependency and delinquency cases who are represented by the same attorney for all cases.	Toolkit Measures	Generally not currently collected.
	Parent/Child Attorney Participation in Out-of-Court Meetings: <ul style="list-style-type: none"> <li>Type of meetings</li> <li>Time spent in meetings</li> </ul>	Indicators of Success; LA Indicators	Generally not currently collected.*
<b>Out of Court Work</b>	Attorney Client Contact: <ul style="list-style-type: none"> <li>Frequency</li> <li>Nature of Contact (via phone, in person,</li> </ul>	Indicators of Success; LA Indicators	Generally not currently collected.*

Performance Measure	Indicator	National documents that recommend this performance measure	Is this collected/ reported?
	immediately before court proceeding?)		
Court Room Practice	Government Attorney Present at Court	Toolkit Measures	Not currently collected.
Client Satisfaction	Client (parent, child, caseworker, DHS mgmt.) satisfaction	Indicators of Success; National Center for State Courts CourTools <sup>132</sup> ; LA Indicators	Generally not currently collected.*
* Currently collected and monitored in OPDS PCRCP counties (Linn, Yamhill and Columbia).			

**Recommendation #3: A standing workgroup coordinated by the Judicial Department that includes representatives from DHS child welfare, DOJ, OPDS, and ODAA should be formed to meet quarterly and implement the collection and reporting of the recommended quality assurance measures and engage in a basic continuous quality improvement process.**

Understanding that Oregon has not systematically collected quality assurance outcome and output measures directly related to the dependency representation system, a workgroup should be formed to implement Recommendations #1 and #2. As Oregon undertakes this work for the first time, the workgroup should focus on creating a strong foundation and simple, straightforward means to collect and report these measures and provide recommendations for systemic improvement. The work of this group will ultimately provide the state, stakeholders, and representation entities with the information necessary for continuous conversations about and improvements to the dependency representation system.

The Judicial Department is best suited to provide ongoing leadership and coordination of this work; the longstanding work of the JCIP to develop and implement performance measures and assist local courts with continuous quality improvement activities helps improve outcomes at the local level through local multidisciplinary model court teams.

**Recommendation #4: Resources should be provided to the Judicial Department to coordinate and support these continuous quality improvement efforts described in Recommendation #3. Resources should also be provided to each entity supervising or coordinating the attorneys who practice in the dependency representation system (DOJ, OPDS, and ODAA) to support workgroup participation and the collection and reporting of quality assurance measures.**

Juvenile and family law cases take up a significant share of the workload of many of Oregon’s courts and profoundly impact the lives of thousands of children and parents each year. Despite the importance of these cases to both courts and families, and despite Oregon’s being one of the first state court systems in the country to adopt and report statewide performance measures, OJD has, since 2009, has only been able to provide very limited performance metrics, via detailed reports on juvenile dependency court practice statewide. The present lack of capacity to track caseloads and processing times for all court cases has left circuit courts unable to adequately monitor improvements in case processing, evaluate new programs or staffing patterns, or identify weaknesses in performance compared to other Oregon courts. Lack of data analysis and research capability also prevents the Office of the State Court Administrator, Chief Justice, trial courts, internal and external stakeholders, and the Legislature from making data-informed decisions on potential system, resource, and statutory changes concerning Oregon’s children and families. The limited dependency court performance measure work that OJD has accomplished in

recent years has been funded through a federal Court Improvement Program grant. The OJD currently does not have the resources to lead and coordinate this multi-agency data collection, reporting, and continuous quality improvement process. A one FTE analyst would be needed to support this work at OJD as OJD would need dedicated staff to provide:

- ongoing leadership and coordination of the work group.
- data reporting, statistical analysis, and performance measure support for the new data measures that would be required of OJD (such as continuances and set-overs, attorney presence at hearings).
- expert advice and guidance (to DOJ, DAs, and OPDS) on sound data mining and reporting techniques and methodologies for collecting the workload and out of court measures.
- coordination of periodic client satisfaction surveys.
- coordination of annual reports to the legislature on performance measures and continuous quality improvement activities.

The entities that supervise and coordinate the attorneys who practice in the dependency system have limited experience in and capacity for quality assurance and continuous quality improvement processes. Building data collection tools, providing training and support to more than 350 attorneys handling more than 47000 hearings in 2014, creating and managing reports, and analyzing data, are tasks which would require additional resources within the Office of Public Defense Services. Support for .2 FTE analyst position at OPDS will be needed to support this work. DOJ, as the agency's attorney, would require additional resources to collect and analyze the quality improvement measures described above and adequately provide statistics and actively participate in any statewide work group. Support for .2 FTE Research Analyst 1 (Step 2) position at DOJ will be needed. Providing a limited amount of resources to support this work will ensure that these processes can be created and implemented in a meaningful way.

## Advancing Strong Crossover Case Coordination

### 1. Findings

National practitioner-experts have identified three categories of youth that have some involvement in both the delinquency and dependency system:

- **Crossover Youth:** Youth who experience maltreatment and engage in delinquency and who may or may not be known to the child welfare and/or juvenile justice systems
- **Dually-Involved Youth:** Crossover youth who have some level of concurrent involvement (diversionary, formal, or a combination of both) with both the child welfare and juvenile justice systems
- **Dually-Adjudicated Youth:** Dually-involved youth who are formally involved (sustained dependency court allegation) and are adjudicated by the delinquency court<sup>133</sup>

Research has established that youth who have been abused or neglected are more likely to engage in delinquent behavior and become involved in the juvenile justice system.<sup>134</sup> In spite of this fact,

“youth known to both the child welfare and juvenile justice systems...tend to go undetected, following a stealth-like pathway between these two systems. As a group of children and youth suffering from the effects of childhood trauma, they are often underserved as they move from one system to another, experiencing the consequences of too little cross-systems coordination in developing case plans that will best serve them.”<sup>135</sup>

These same youth face more dire outcomes than youth involved in the child welfare system alone.<sup>136</sup> Of specific relevance, youth who experience both systems have higher rates of recidivism and adult arrest.<sup>137</sup> For these reasons, research has emphasized the necessity of multi-system collaboration to

comprehensively address the risks and needs of youth involved in both the juvenile justice (delinquency) and child welfare (dependency) systems.<sup>138</sup>

Research has also found that, “[a]fter a youth’s court disposition, a range of important legal issues persist related to conditions of their confinement, probation compliance, parole review, early release, appeals, access to education, and access to housing, among others.”<sup>139</sup> These issues are only further complicated by dual system involvement.

Because jurisdictions often find it difficult to identify youth with dual system involvement, regardless of their pathway or entry into these systems, and because information is rarely shared across systems,<sup>140</sup> national work has been done by the Georgetown Center for Juvenile Justice Reform and John F. Kennedy Children’s Action Corps to design, pilot, and document better integrated systems,<sup>141</sup> practice models,<sup>142</sup> and standard protocols<sup>143</sup> for youth with dual system involvement. Complementing this work, national organizations, including the Juvenile Indigent Defense Action Network, have recognized that that post-disposition representation in juvenile delinquency cases is a best practice and have piloted programs in states across the country with positive results.<sup>144</sup>

A report commissioned by the Oregon Youth Development Council describes in detail the characteristics of Oregon youth who are dually involved. The study looked at youth from 1998-2010 and identified: “12,307 individual youth who had records in both [child welfare and juvenile justice] systems. This represents 11 percent of the youth with founded child welfare cases and 7.3 percent of the juvenile justice referrals. It would be a mistake however to use those percentages as estimates of the extent of the crossover issue, since it may take youth a period of several years to move between the two systems.”<sup>145</sup>

Using different methodology, the same study found that from 2004-2009, 15.4 percent of juvenile justice referrals involved juveniles with previous child welfare contact and that, from 2006-2010, there was a steady decline in the percentage of children in the child welfare system with juvenile justice contact, trending toward three percent or less.<sup>146</sup>

The report also found that half of the youth who are dually involved have some period of simultaneous or overlapping involvement in both systems.<sup>147</sup> In addition, about half of Oregon’s crossover youth first come into contact with the child welfare system, and half first come into contact with the juvenile justice system.<sup>148</sup> American Indian and Alaska Native youth, as well as African American/Black youth, are overrepresented in the crossover youth population at rates higher than their overrepresentation in either the child welfare or juvenile justice system alone.<sup>149</sup> Similarly, although young women are under-represented in the juvenile justice system (36%) they make up nearly half (46%) of Oregon’s crossover youth.<sup>150</sup>

In order to better serve Oregon crossover youth, currently, Lane, Marion, Multnomah, and Washington Counties function under crossover case protocols that were crafted with technical assistance from the Georgetown Center for Juvenile Justice Reform. In addition to the formal protocols that are in place, many of these counties have also developed promising informal practices to coordinate cases that cross over between delinquency and dependency. In addition, Jackson and Douglas Counties are currently in the process of developing crossover case protocols with technical assistance from the same center. Funding and support for these efforts has come from the Youth Development Council in the Department of Education. Beyond this current cycle of counties, however, funding will no longer be available at the level necessary to access technical assistance directly from the Georgetown Center for Juvenile Justice Reform. In a recent survey by JCIP, Columbia, Wasco, Deschutes, Lincoln, and Clackamas counties indicated an interest in implementing a crossover case protocol. In addition, OPDS and OSB Performance Standards support and encourage post-disposition representation.<sup>151</sup> Practice regarding appointment of post-disposition attorneys, however, varies across the state, and resources for this practice are uncertain.



The crossovers that occur between the delinquency and dependency system reflect one set of systemic interactions. There are also often cases where crossover issues between the dependency and criminal justice system and the dependency and the domestic relation system arise. Although less work has been done to study these cases at the national and local level, these crossovers can have significant impacts on outcomes for children and families in the dependency system.

## 2. Recommendations

**Recommendation #1: Oregon practice should target crossover youth who have current and simultaneous involvement in both the child welfare and juvenile justice system in the following ways: 1) youth with an open case in the child welfare/dependency system who are subsequently referred to the juvenile justice/delinquency system, and 2) youth with an open case in the juvenile justice/delinquency system and are subsequently referred to and become involved in the child welfare/dependency system.** The purpose of identifying crossover cases should, wherever possible, be to (1) prevent crossover from dependency into delinquency systems; (2) assure, that whenever possible, that the intervention is actually based on the youth's conditions and circumstances and the youth is placed in the least restrictive setting possible; and (3) when dual system involvement is necessary, ensure a coordinated streamlined response to the overlapping issues that bring the youth into multiple legal systems.

**Recommendation #2: A basic statewide crossover case protocol should be established.** This protocol should be based on the current protocol used in counties throughout Oregon and designed to promote consistent best practices with regard to information sharing, case management, and cross-systems decision-making in order to adequately protect and promote the legal interests of children across disparate court systems that may include dependency, delinquency, criminal justice, immigration, and domestic relations. The protocol should be considered the floor, not the ceiling, for crossover case practice in Oregon.

This protocol should be crafted by a team that includes all relevant stakeholder groups, including those who represent children, parents, and the government in dependency and delinquency proceedings. The team would include, but not be limited to, the ODAA, DOJ, OPDS, OCDLA, DHS, the Office of Youth Authority, the JCIP, Oregon Juvenile Department Directors Association, the Judiciary, the Department of Corrections, the Oregon Coalition of Children's Programs, the OSB, and parents and youth with experience in these systems.

**Recommendation #3: JCIP should continue to partner with the Youth Development Council to help facilitate peer-to-peer technical assistance for counties that wish to develop more robust protocols than the basic statewide crossover case protocol.** With four counties having current crossover case practices in place and two currently working toward this end, Oregon has established a cohort of local practitioner-experts. These experts, coupled with assistance from state level partners, offer a strong and low cost technical assistance team to counties hoping to expand on the basic statewide crossover case protocol through improved and enhanced local practice.

**Recommendation #4: Performance standards for all delinquency, dependency, and criminal practitioners should be updated (or crafted) to reflect the unique nature of representation in crossover cases.** The OSB Performance Standards for Representation in Criminal and Juvenile Delinquency and the OSB Performance Standards for Representation in Juvenile Dependency cases should include a requirement that all practitioners, regardless of their primary area of practice, have a basic understanding of the delinquency, dependency, and criminal justice systems, as well as child (including child brain) development; should necessitate a close collaboration between dependency and delinquency or criminal defense attorneys in crossover cases; and the Criminal and Juvenile Delinquency Standards should delineate the specific training needed by attorneys who represent juveniles charged with Measure 11 offenses. If or when corresponding standards are crafted for government counsel, they should include a requirement that all practitioners -- regardless of their primary area of practice -- have a

basic understanding of the delinquency, dependency, and criminal justice systems, as well as brain and child development, and should prescribe the specific training needed by attorneys who represent juveniles charged with Measure 11 offenses.

**Recommendation #5: The Office of Public Defense Services should strive to ensure that, where practicable, a one lawyer one youth model is the general practice in crossover cases.** Where one-lawyer-one-youth representation is not possible, OPDS should require that any attorneys representing the youth fulfill the OSB Performance Standards regarding representation of youth in crossover cases, and if the Standards are not updated pursuant to recommendation #4, that the two attorneys collaborate in their representation.

**Recommendation #6: The Office of Public Defense Services, the courts, and other system stakeholders should identify ways to implement consistent post-disposition representation across the state, including for youth committed to the Oregon Youth Authority.** Post-disposition is often a lengthy period of the delinquency court process that includes numerous complex legal issues that require counsel to guide youth toward better outcomes and away from further court involvement. Custodians and guardians of youth should ensure that youth are aware of their rights, post-disposition, including access to counsel and an opportunity for court review of placement.

**Recommendation #7: Training on crossover cases as well as the basics of criminal, delinquency, and dependency practice should be made available in Continuing Legal Education (CLE) and training opportunities across these three practice groups.** This would mean, for example, offering a CLE on the basics of dependency practice for criminal practitioners that specifically addresses the overlap between the systems and how decisions in each system may affect the other. OSB practice groups should team up to offer these cross-disciplinary trainings, as they may serve as an opportunity to not only build knowledge but also build important relationships across these systems.

## Findings & Recommendations: Task Force Implementation

At the national, state, and local level the interconnectedness of the juvenile court, child welfare, and community stakeholder systems is widely recognized. Changes in one entity will affect the success of all related systems.<sup>152</sup> By relying on a model that included participants from all three branches of government, this Task Force has crafted recommendations designed to improve not only the dependency system, but also the child welfare system as a whole.

This is not the first time that Oregon has examined its dependency representation systems. It is, however, the first time that solutions that propose cost-effective full representation have been recommended. Driven by the a three-branch process and principles of due process and better outcomes, this Task Force came together to look beyond the status quo and truly promote change and appropriate compromise for the sake of better outcomes for Oregon children and families.

It is the strong hope of this Task Force that this important work not be relegated to a report that sits on the shelf. For this reason, the Task Force offers the following findings and recommendations, crafted to promote the implementation of its other findings and recommendations, as well as the ongoing exploration of opportunities for systemic changes that will support effective and efficient dependency representation and improve outcomes for Oregon children and families.

### 1. Findings

A 2014 Work Group on Juvenile Court Dependency Proceedings identified barriers to permanency specific to the dependency system, and found that:

“[I]n order to effect more substantial improvement for children and families involved in the juvenile system, improved legal representation for all parties and a judiciary with sufficient time

and resources is needed to give parents and children the attention and priority that they deserve.”<sup>153</sup>

This Task Force builds on the efforts of the 2014 work group by setting forth clear recommendations to improve legal representation and enhance judicial resources for the dependency system. This report creates a road map for a better dependency system. In order to realize the shared goals of ensuring the fair and consistent treatment of parents and children in Oregon and giving the dependency system the attention that it deserves, this report must be implemented purposefully and with an eye toward increasing system efficiencies.

## 2. Recommendations

**Recommendation: A voluntary subset of Task Force members should continue to meet regularly to implement the recommendations of this report.** This voluntary group, comprised of Task Force members and stakeholders, will monitor and support the implementation of this report. This group will also work closely with judicial leadership and the JCIP, as well as the DOJ, DHS, OPDS, and DAs, to assess current laws and policies (including, but not limited to, Oregon Administrative Rules, Uniform Trial Court Rules, and Child Welfare Policies and Procedures), and promote changes that will support the implementation of these recommendations, improve system efficiency, and promote cost savings. The voluntary group may also explore areas for further inquiry listed below, develop recommendations and implement substantive practice changes.

### Findings: Areas for Further Inquiry

In order to support the model recommendations described above, the Task Force, through its subcommittees and at the direction of the Legislature in S.B. 222, also assessed discrete system areas that affect the overall practice of dependency representation, including: issues with regard to the unlawful practice of law, performance standards, quality assurance and continuous quality improvement measures, and improved crossover case practice. Findings and recommendations are provided below.

## Supporting Juvenile Courts

### 1. Findings

As described by the National Council of Juvenile and Family Court Judges:

“Judging in juvenile court is specialized and complex, going beyond the traditional role of the judge. Juvenile court judges, as the gatekeepers to the foster care system and guardians of the original problem-solving court, must engage families, professionals, organizations and communities to effectively support child safety, permanency, and well-being.”<sup>154</sup>

Oregon, like many states, has adopted judicial time lines and strives to achieve a one-judge-one-family model. Training and resources, however, continue to be a concern both in Oregon and nationally, with national organizations continuing to highlight these needs.<sup>155</sup> In 2011, the National Council for Juvenile

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<sup>9</sup> The USDHHS recommends that “state legislatures ensure that courts handling child abuse and neglect cases are well organized [sic] to achieve the goals of child safety, permanency, and health”<sup>9</sup> and provides the following commentary:

“The quality of the judicial decision-making process depends, to a large extent, on characteristics of judicial organization and structure. For example, it is important that the same court (and judge) hears all stages of a child abuse or neglect case. It is equally important that judges and attorneys receive specialized training concerning child welfare cases; that there are comprehensive deadlines governing the court process; and that the judiciary and bar handling child welfare cases are specialized in child welfare or other family matters. It is essential that adequate resources are

and Family Court Judges stated: “Juvenile and family courts must be appropriately supported. Courts must maintain a sufficient number of specially trained and permanently assigned judicial officers, staff, attorneys and guardians *ad litem* to thoroughly and effectively conduct the business of the court.”<sup>156</sup>

Trainings have been shown to be particularly important and effective. One national training curriculum, the Child Abuse and Neglect Institute (CANI), provides instruction in best practices for judicial officers who have either been newly assigned to child abuse and neglect cases or for experienced juvenile dependency judges who would like to learn about emerging and promising practices in this field.<sup>157</sup> Assessments of the efficacy of this training have shown that judges who attend not only learn from the training but change their decision-making behavior in a way that improves the dependency court process.<sup>†</sup>

The root of strong judicial practice, however, remains adequate judicial resources.<sup>158</sup> A recent workload study of Oregon’s courts by the National Center for State Courts (NCSC), (reports forthcoming), found that most Oregon’s courts do not have as many judicial officers as they need to process their caseloads. Observations of dependency hearings found that hearings often do not cover key items regarding the child’s needs and well-being and parents’ progress. Analysis of the data collected in court and discussions in a series of juvenile judge focus groups led NCSC to make the following best practice recommendations for dependency hearings in Oregon:

- Shelter hearings: 25 minutes
- Jurisdiction/Disposition hearings: 30 minutes
- Permanency hearings: 30 minutes
- Review hearings: 30 minutes

Data from the NCSC’s court observations and workload study, as well as data drawn from OJD’s OJIN and Odyssey case management systems, show that durations of hearings, particularly shelter and permanency hearings, fall well short of the estimated times needed to cover all essential items (including the necessary off-bench time to complete orders, judgments and related judicial findings). In focus groups, juvenile judges reported they often lack enough off-bench time to thoroughly review court reports and other materials ahead of their hearings.

## Developing a Dedicated Work Force

### 1. Findings

The role of a dependency attorney is unique:

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available to the courts, including adequate staffing levels for judges and attorneys in child protection cases. State legislatures can either determine or have a major influence on each of these issues.”

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCY FOR CHILDREN, IV-2 (1999).

<sup>†</sup> Specifically after the training, participants were more likely to

- appoint a CASA for the child;
- order services for the mother;
- recommend that the child be placed with the father;
- cite the child’s risk of harm as an important piece of information to be considered in their orders and findings;
- request additional information regarding the child’s well-being, specifically relating to the child’s physical and emotional well-being; and
- an increase in Indian Child Welfare Act (ICWA) inquiries.

ALICIA DeVULT, LORIE SICAFUSE, & ALICIA SUMMERS, RESEARCH REPORT: 2014 CHILD ABUSE AND NEGLECT INSTITUTE IN RENO, NV 5 (2014), available at <https://rcdvcpc.org/view-resources-temporary/43-research-report-2014-child-abuse-and-neglect-institute.html>.

“When a parent takes a child to a physician who specializes in pediatric medicine, the parent expects that the pediatrician has had the benefit of specialized training in the diagnosis and treatment of children. A child in need of legal representation should, in the same way, benefit from a lawyer’s specialized training in the law and practice particular to children. Programs are needed to train pediatric lawyers so that they will be confident in their ability to provide the finest legal representation to their young client.”<sup>159</sup>

Although this statement directly addresses the need for specialized attorneys for children, it is equally applicable to parent and government dependency practitioners.

Law schools across the country have multidisciplinary child welfare and family defense clinics that train future practitioners through rigorous programs that combine classroom learning, supervised direct client representation, and externship opportunities.<sup>160</sup> The literature describes the various ways that the child advocacy and family defense programs train qualified practitioners and improve dependency practice across a system.<sup>161</sup> Descriptions of child advocacy programs show that these academic laboratories not only develop cohorts of skilled and dedicated dependency practitioners, but they also often serve as important centers for practice innovation, policy development, and training and technical assistance for seasoned practitioners.<sup>162</sup> Although law schools in Oregon have some components of a successful child advocacy clinical law programs, none of the Oregon law schools offers a complete training program for students interested in dependency practice.

## Decreasing Disproportionality

### 1. Findings

In Oregon, African American/Black children and American Indian/Alaskan Native (“AI/AN”) children are disproportionately represented in the foster care system. For example, the 2014 DHS Child Data handbook reports that, although African American/Black children comprise 3.3% of Oregon’s child population, they constitute 6.7% of the children in foster care; AI/AN children are 1.6% of the child population, but 5.6% of the children in foster care.<sup>163</sup> In 2011, the Oregon Governor’s Task Force on Disproportionality in Child Welfare found that:

“Foster care in Oregon is used much more often and for much longer periods of time for African American and American Indian/Alaskan Native children than for white children. The overrepresentation of children, families and communities of color in Oregon’s foster care system represents both a serious social injustice and an economic emergency. But it also offers an opportunity for Oregon to lead the charge in eliminating this persistent and complex nationwide problem.”<sup>164</sup>

The 2011 Task Force took the strong position that reducing disproportionality “must be a priority for the State and for the Legislature” for two important reasons:

- The unacceptable human impact to African American and Native American children who languish in the foster care system and their families; and
- The financial consequences to the state and its citizens when disadvantaged children become part of a system that will virtually guarantee a further decline in opportunities available to them when they exit the system.<sup>165</sup>

This Task Force heeds the findings of the Disproportionality Task Force and recognizes that, in addition to the DHS, attorneys for all parties in dependency proceedings play an important role in Oregon’s efforts to eliminate this persistent and complex problem.

# Improving ICWA Compliance

## 1. Findings

In 1978, Congress enacted the Indian Child Welfare Act (ICWA) in response to a national crisis in which an alarmingly high percentage of American Indian and Alaska Native (AI/AN) children were being removed from their families and tribal communities and placed in non-Native homes. ICWA creates unique jurisdictional rules,<sup>166</sup> guarantees parents access to legal representation<sup>167</sup>, and assigns enhanced legal responsibilities to states, including heightened evidentiary standards, an active efforts standards, rather than reasonable efforts standard, and a qualified expert witness requirement.<sup>168</sup> Additionally, under ICWA, a child's tribe is eligible to intervene as a party in state child welfare proceedings.<sup>169</sup> In Oregon, tribal child welfare workers need not be attorneys to appear in court and represent the Tribe's interest in a case.<sup>170</sup> Unfortunately, significant barriers still stand in the way of tribes' ability to intervene in these cases, including inadequate or late notice, *pro hac vice* requirements, and attorney costs.

DHS and dependency practitioners strive to adhere to the requirements of ICWA and identify all eligible children. "Oregon works closely with the federally recognized tribes to ensure ICWA standards are applied and tribes are involved in the decisions about these children."<sup>171</sup> Yet, in spite of these efforts, ICWA-eligible children are still over-represented in the Oregon child welfare system. In 2014, a total of 562 children served in foster care were ICWA eligible. This was 4.9% of all children served in foster care, whereas American Indian or Alaskan Native children are only 1.6% of the children in Oregon.<sup>172</sup> National organizations attribute this continued overrepresentation to misunderstandings about the law and a lack of adequate ICWA training.<sup>173</sup>

# Appendices

## Appendix A: Problem Statement and Scope

The State of Oregon is committed to protecting children and supporting families. Strong families and healthy children are the heart of our communities and the future of our state. It is the policy of the State of Oregon to safeguard and promote each child's right to safety, stability, and well-being. The State of Oregon also recognizes the importance of a child's relationships with parents and other relatives. Although there is a strong preference that children live in their own homes, when this is not possible, the State of Oregon has the obligation to create or provide an alternative, safe, and permanent home for the child. These rights and responsibilities are safeguarded by the attorneys who represent children, parents, the state, and the Department of Human Services (DHS) in dependency cases in Oregon's Juvenile Court system and by Court Appointed Special Advocates (CASAs), who advocate for the best interests of children.

As a matter of justice, it is paramount that the model for legal representation provides efficient and effective legal services to all parties. These services should guarantee that judges hear balanced and complete evidentiary presentations and legal arguments, that legal issues that arise are effectively addressed, and that clients have access to legal advice throughout the duration of a case. The model must ensure that all parties have competent representation and a full, fair, and expeditious hearing. In addition, the model must ensure that the interests and rights afforded to parties in juvenile dependency proceedings are protected and safeguarded and that the proceedings comport with the principles of due process.

Currently in Oregon, nine of every 1,000 children are removed from their homes where they remain in care, on average, just over 19 months. Of the children in care, more than one-third move between three or more placements and more than one-third still await permanency after 24 months in the system. The model for legal representation in Oregon should, without sacrificing the demands of due process, promote the outcomes the Oregon child welfare system strives to achieve. To that end, the Task Force will study and report on the effects that prospective models for legal representation are likely to have on such outcomes, including outcomes related to prevention, stability in out-of-home care, and timely permanency.

In the current model for dependency case representation, District Attorneys, represent the State of Oregon at initial dependency proceedings (with the exception of Multnomah County, where the DA receives \$2.6 million from DHS to also represent the agency at TPR proceedings). DAs primarily fund their own work but are eligible for a pro-rated share of \$2.1 million in supplemental payments from DHS and may enter into agreements to receive Title IV-E federal reimbursement for approximately 32% of their expenses. The Department of Justice (DOJ) represents DHS. DHS is billed at \$175 per hour for DOJ legal assistance. The Office of Public Defense Services (OPDS) contracts with attorneys to represent children and parents; payment is based on attorney participation in court proceedings. The average payment from OPDS to a parent or child's attorney is \$792 for cases handled from the initial appointment through disposition, \$339 for each post-dispositional proceeding (for example, review hearings, Citizen Review Board proceedings and permanency hearings), and \$2,581 for representation in TPR cases. In addition, OPDS makes available limited funds for investigators and expert witnesses for necessary and reasonable expenses for case presentation, preparation, and negotiation.

The legislature allocates the larger DHS budget. From this budget, DHS must pay DOJ based on its hourly charges and supplement the work of the DAs. The cost of the current system has forced DHS to make difficult decisions about when to seek legal advice and request representation in court. The legislature also allocates the larger OPDS budget. From this budget OPDS must support the work of over 300 attorneys who represent parents and children across the state. The current OPDS payment model, based on court proceeding participation, does not accurately reflect the workload and performance obligations required of attorneys who represent parents and children.<sup>5</sup> A constraint on resources and the prevailing billing model in the current system require parent and child's attorneys to take on unmanageable caseloads to support themselves or their agencies. In addition, Oregon CASA programs have inadequate access to legal counsel. The availability of judicial resources for dependency cases also affects this model.

Varied interpretations of Oregon's unlawful practice of law statute have led to increased requirements and, in turn, increased costs for DHS representation in some counties and increased workloads for DOJ attorneys. At the same time inadequate financial support and difficult decisions about public safety have caused some DAs to withdraw from their role representing the state in initial dependency proceedings. In response to these developments, the legislature recognized these challenges and mitigated the risk of unlawful practice of law by DHS case workers through Oregon Laws 2014 Chapter 106 (H.B. 4156). Also recognizing the importance of meaningful parent representation, the legislature supported pilot projects allowing OPDS to implement national best practices in two Oregon counties. The sunset of H.B. 4156 and the recent start of the pilot projects provided momentum for this Task Force. The Task Force is charged to assess the current state of legal representation in Juvenile Court dependency cases and recommend a model for legal representation that will improve outcomes for and fulfill the state's responsibility to provide justice for Oregon children and families.

To fulfill this undertaking the Task Force will:

- Identify the current obstacles to providing quality cost-effective, outcome-oriented legal representation in Oregon dependency cases.
- Survey the practices of other states, assess the practices across Oregon counties, and identify those practices that have the potential to support good outcomes for Oregon families in each jurisdiction.
- Review statutes and case law on the unauthorized practice of law in order to achieve an appropriate balance between the objectives of protecting case workers and the state of Oregon from unnecessary liability and ensuring that only qualified attorneys provide legal advice and services in dependency proceedings.
- Create subcommittees to consider the use of performance standards, protocols for crossover cases, and quality assurance to support the larger goal.

The Task Force will then make recommendations regarding the laws, policies, standards, intergovernmental agreements, and funding that govern dependency practice. These recommendations will support the implementation of a cost-effective, outcome-oriented business model of dependency representation that will improve outcomes for and fulfill the state's responsibility to Oregon children and families.

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<sup>5</sup> The Oregon State Bar Performance Standards require that attorneys for parents and children provide ongoing legal advocacy, including regular client contact, attendance at case-related meetings, and independent investigation throughout the life of the case, regardless of the number of in-court proceedings.



## Appendix B: Subcommittee Assignments

<b>Subcommittee- Scope</b>	<b>Membership- (Chairs in Bold)</b>
<p><b>Performance Standards-</b> Determine the need and/or continued need for performance standards for attorneys representing children, parents, the agency and the state. Review best practices in Oregon and nationally. Make general recommendations to be discussed/adopted by the Task Force regarding performance standards and the <i>general</i> content or content changes needed to create new or improve current performance standards.</p>	<p><b>Angela Sherbo, YRJ</b>            Amy Benedum, OJD            Lori Fellows, Mult. Co. DA            Joanne Southey, DOJ            Lynn Travis, CASA</p>
<p><b>Quality Assurance-</b> Determine the need for quality assurance measures and continuous quality improvement efforts for Oregon's dependency representation system (and/or its individual parts: parent/child representation and state/agency representation). Review best practices in Oregon and nationally. Make general recommendations to be discussed/adopted by the Task Force regarding quality assurance, the <i>general</i> content of quality assurance measures and methods for continuous quality improvement, and the entity(ies) most appropriate to oversee these processes.</p>	<p><b>Leola McKenzie, OJD</b>            Lori Fellows, Mult. Co. DA            Mimi Laver, ABA Center on Children &amp; Law            Amy Miller, OPDS            Conor Wall, OJD            Jason Walling, DHS            Inge Wells, DOJ</p>
<p><b>Crossover Cases-</b> Determine the need for cross over case protocols in Oregon. Review promising crossover case practice in Oregon and nationally. Make recommendations to be discussed/adopted by the Task Force for improved cross over case practice for state, agency, and youth attorneys.</p>	<p><b>Hon. Nan Waller, Mult. Co.</b>            Megan Hassen, OJD            Torri Lynn, OJDDA            Brendan Murphy, Marion Co. DA            Joe O'Leary, OYA            Liz Wakefield, Metro Public Defender Svs.            Jason Walling, DHS            Kamala Shugar, DOJ</p>
<p><b>Unlawful Practice of Law-</b> Review current dependency practice in light of statutes and case law on the unauthorized practice of law. Provide recommendations to be discussed/adopted by the Task Force that promote an appropriate balance between protecting case workers and the State from unnecessary liability and ensuring that when necessary, qualified attorneys provide legal services in dependency proceedings.</p>	<p><b>Hon. Daniel Murphy, Linn Co.</b>            Hon. Justice David Brewer            Hon. Lisa Fithian-Barrett, Mult Co.            Hon. Norm Hill, Polk Co.            Valerie Colas, OPDS            Amber Hollister, OSB            District Attorney Matt Shirtcliff, Baker Co.            Joanne Southey, DOJ</p>
<p><b>Alternative Models-</b> Review the practice, cost, and outcomes of models of state/agency and parent/child representation used by Oregon and other states. Compare and contrast these models of representation to the current Oregon model. Assess alternative models of representation used nationally or endorsed by standard setting organizations. Present to the Task Force for further discussion information on what models save cost, protect due process, and promote outcomes. Present to the Task Force for further discussion information about how various models meet the needs and/or unique nature of Oregon dependency proceedings.</p>	<p><b>Professor Leslie Harris</b>            Representative Kathleen Taylor            Michael Livingston            Fred Boss, DOJ            Nancy Cozine, OPDS            Mimi Laver, ABA Center on Children &amp; Law            Dani Ledezma, Office of Gov. Brown            Mark McKechnie, YRJ            Leola McKenzie, OJD            Channa Newell, Judiciary Committee Counsel            District Attorney Rod Underhill, Mult. Co            Ryan Vogt, DHS</p>

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- <sup>1</sup> CENTER ON CHILDREN AND THE LAW, AMERICAN BAR ASSOCIATION, SUMMARY OF PARENT REPRESENTATION MODELS 1 (2009) [hereinafter *ABA Summary*].
- <sup>2</sup> ADMINISTRATION FOR CHILDREN AND FAMILIES: CHILDREN’S BUREAU, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, STANDARDS OF LEGAL REPRESENTATION FOR CHILDREN, PARENTS, AND THE CHILD WELFARE Agency 2 <http://www.acf.dhhs.gov/programs/cb/publicatoins/adopt02/02adpt7.htm> (last visited Nov. 2, 2005) [hereinafter *DHHS Standards*].
- <sup>3</sup> *Id.*
- <sup>4</sup> VIVEK S. SANKARAN, PATRICIA L. RIDEOUT & MARTHA L. RAIMON, STRANGE BEDFELLOWS: HOW CHILD WELFARE AGENCIES CAN BENEFIT FROM INVESTING IN MULTIDISCIPLINARY REPRESENTATION (2015), available at <http://www.cssp.org/reform/child-welfare/strange-bedfellows-how-child-welfare-agencies-benefit-from-multidisciplinary-parent-representation.pdf>.
- <sup>5</sup> Jillian Cohen & Michelle Cortese, *Cornerstone Advocacy in the First 60 Days: Achieving Safe and Lasting Reunification for Families*, 28 ABA CHILD LAW PRACTICE 1 (May 2009).
- <sup>6</sup> CENTER ON CHILDREN AND THE LAW, AMERICAN BAR ASSOCIATION, INVESTMENT THAT MAKES SENSE 2-3, available at [http://www.americanbar.org/content/dam/aba/administrative/child\\_law/ParentRep/At-a-glance%20final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/child_law/ParentRep/At-a-glance%20final.authcheckdam.pdf) (last visited July 5, 2016) [hereinafter *Investment that Makes Sense*].
- <sup>7</sup> Elizabeth Thorton & Betsy Gwin, *High-Quality Legal Representation for Parents in Child Welfare Cases Result in Improved Outcomes for Families and Potential Cost Savings* 46 FAM. L. Q. 139-54 (Spring 2012); MARK COURTNEY, JENNIFER L. HOOK, & MATT ORME, PARTNERS FOR OUR CHILDREN, EVALUATION OF THE IMPACT OF ENHANCED PARENTAL LEGAL REPRESENTATION ON THE TIMING OF PERMANENCY OUTCOMES FOR CHILDREN IN FOSTER CARE, available at [https://partnersforourchildren.org/sites/default/files/2011\\_evaluation...\\_impact\\_of\\_enhanced\\_parental\\_legal\\_representation...discussion\\_paper.pdf](https://partnersforourchildren.org/sites/default/files/2011_evaluation..._impact_of_enhanced_parental_legal_representation...discussion_paper.pdf).
- <sup>8</sup> THE CENTER FOR FAMILY REPRESENTATION, 2013 REPORT TO THE COMMUNITY, available at <https://www.cfrny.org/wp-content/uploads/2013/11/CFR-2013-Report-to-the-Community.pdf> [hereinafter *CFR 2013 Report*]; *Investment that Makes Sense*, *supra* note 6.
- <sup>9</sup> ANDREW ZINN & JACK SLOWRIVER, EXPEDITING PERMANENCY: LEGAL REPRESENTATION FOR FOSTER CHILDREN IN PALM BEACH COUNTY (2008), available at <http://www.chapinhall.org/research/report/expediting-permanency>; Thorton & Gwin *supra* note 7; Courtney, Hook, & Orme *supra* note 7.
- <sup>10</sup> *CFR 2013 Report*, *supra* note 8.
- <sup>11</sup> *Investment that Makes Sense*, *supra* note 6, at 3.
- <sup>12</sup> INDIGENT TASK FORCE III, REPORT 8-9 (2000), available at <https://www.osbar.org/docs/idthf/idthf3.pdf>.
- <sup>13</sup> OFFICE OF THE SECRETARY OF THE STATE, 2005 OPDS AUDIT 2, available at <http://sos.oregon.gov/Documents/audits/management/2005/404-2005-02-01.pdf>.
- <sup>14</sup> Senate Bill 411 (2007); see Ingrid Swenson, *Memorandum: Representation of Parents and Children in Juvenile Dependency Cases* (2011), available at <http://www.oregon.gov/OPDS/docs/Agendas/07-28-11.pdf> (detailing and discussing S.B. 411 (2007)).
- <sup>15</sup> *Id.*
- <sup>16</sup> See PARENT CHILD REPRESENTATION PROGRAM, ANNUAL REPORT 2014-2015 (2016), available at [https://www.oregon.gov/OPDS/docs/Reports/PCRP\\_report\\_PDSC\\_Jan\\_2016.pdf](https://www.oregon.gov/OPDS/docs/Reports/PCRP_report_PDSC_Jan_2016.pdf).
- <sup>17</sup> *Id.*
- <sup>18</sup> See, e.g., *ABA Summary*, *supra* note 1.
- <sup>19</sup> *Id.*
- <sup>20</sup> *Id.* at 2.
- <sup>21</sup> CENTER ON CHILDREN AND THE LAW, AMERICAN BAR ASSOCIATION, COURT IMPROVEMENT PROGRAM PARENT ATTORNEY SURVEY RESULTS 6 (2011).
- <sup>22</sup> CENTER ON CHILDREN AND THE LAW, AMERICAN BAR ASSOCIATION, PARENT ATTORNEY NATIONAL COMPENSATION SURVEY 3 (2015), available at [https://www.oregon.gov/gov/policy/Documents/LRCD/Meeting1\\_102815/National/Parent\\_representation/2015\\_Parent\\_Attorney\\_Compensation\\_Survey.pdf](https://www.oregon.gov/gov/policy/Documents/LRCD/Meeting1_102815/National/Parent_representation/2015_Parent_Attorney_Compensation_Survey.pdf) [hereinafter *Parent Attorney National Compensation Survey*].
- <sup>23</sup> *Id.*
- <sup>24</sup> MIMI LAVER, AMERICAN BAR ASSOCIATION CHILDREN’S RIGHTS LITIGATION, IMPROVING REPRESENTATION FOR PARENTS IN THE CHILD-WELFARE SYSTEM (Oct. 2013), available at <http://apps.americanbar.org/litigation/committees/childrights/content/articles/fall2013-1013-improving-representation-parents-child-welfare-system.html>; Don Duquette with Julien Darwall, *Child Representation in America: Progress Report from the*

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National Quality Improvement Center, 41 FAM. L. Q. 87, 113-14 (Spring 2009); AMERICAN BAR ASSOCIATION, STANDARDS OF PRACTICE FOR ATTORNEYS REPRESENTING PARENTS IN ABUSE AND NEGLECT CASES 32, available at [http://www.americanbar.org/content/dam/aba/administrative/child\\_law/ParentStds.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/child_law/ParentStds.authcheckdam.pdf) [hereinafter *ABA Parent Representation Stds.*]; AMERICAN BAR ASSOCIATION, STANDARDS OF PRACTICE FOR ATTORNEYS REPRESENTING CHILDREN IN ABUSE AND NEGLECT CASES 21 (1996), available at [http://www.americanbar.org/content/dam/aba/migrated/family/reports/standards\\_abuseneglect.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/family/reports/standards_abuseneglect.authcheckdam.pdf) [hereinafter *ABA Child Representation Stds.*].

<sup>25</sup> *Parent Attorney National Compensation Survey*, *supra* note 22, at 1.

<sup>26</sup> *Id.*

<sup>27</sup> *ABA Child Representation Stds.*, *supra* note 24, at 22.

<sup>28</sup> *Parent Attorney National Compensation Survey*, *supra* note 22, at 2.

<sup>29</sup> MARTIN GUGGENHEIM & VIVEK S. SANKARAN, REPRESENTING PARENTS IN CHILD WELFARE CASES: ADVICE AND GUIDANCE FOR FAMILY DEFENDERS (2015); Cohen & Cortese, *supra* note 5; *ABA Parent Representation Stds.*, *supra* note 24; *ABA Child Representation Stds.*, *supra* note 24.

<sup>30</sup> *Investment that Makes Sense*, *supra* note 6, at 2; Diane B. Rauber, *Working with Parent Partners to Achieve Better Outcomes for Families*, 28 ABA CHILD LAW PRACTICE 165, 165-66 (Jan. 2010) available at ; *ABA Summary*, *supra* note 1 (describing multi-disciplinary models in California, Connecticut, New York, Michigan, New Jersey and Pennsylvania); Lisa Pilnik, *Parents' Social Workers Help Parents Succeed*, 27 ABA CHILD LAW PRACTICE 142 (June 2008).

<sup>31</sup> *Parent Attorney National Compensation Survey*, *supra* note 22, at 6.

<sup>32</sup> See, e.g., Don Duquette and Ann M. Haralambie, *Representing Children and Youth*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS AND STATE AGENCIES IN ABUSE, NEGLECT AND DEPENDENCY CASES (Duquette, Haralambie, and Sankaran eds., 2016).

<sup>33</sup> Trine Bech, Mark Briggs, Elizabeth Bruzzo, Tracy E. Green & Christie Marra, *The Importance of Early Attorney Involvement in Child Welfare Cases: Representation of Parents in Pre-Petition Proceedings* (Second National Parents' Attorney Conference, July 13-14, 2011), available at [http://webcache.googleusercontent.com/search?q=cache:HAea8JrA1RwJ:www.americanbar.org/content/dam/aba/administrative/child\\_law/ParentRep/ImportanceofEarlyAttorneyInvolvement.doc+&cd=1&hl=en&ct=clnk&gl=us](http://webcache.googleusercontent.com/search?q=cache:HAea8JrA1RwJ:www.americanbar.org/content/dam/aba/administrative/child_law/ParentRep/ImportanceofEarlyAttorneyInvolvement.doc+&cd=1&hl=en&ct=clnk&gl=us) [hereinafter *Bech et al.*]; see also, Jane M. Spinak, *Reforming Family Court: Getting It Right Between Rhetoric and Reality*, 31 WASH. U. J. L. & POL'Y 11, 36 (2009); Diane B. Rauber, *From Courthouse to Statehouse: Parents as Partners in Child Welfare* 28 ABA CHILD LAW PRACTICE 161 (Jan. 2010); *ABA Summary*, *supra* note 1 (describing New York and Michigan models of pre-petition representation).

<sup>34</sup> *ABA Summary*, *supra* note 1 (describing New York and Michigan models of pre-petition representation); Rauber, *supra* note 30.

<sup>35</sup> Meghan Scahill, *Prosecuting Attorneys in Dependency Proceedings in Juvenile Court: Defining and Assessing a Critical Role in Child Abuse Cases*, 1 J. OF THE CENTER FOR CHILDREN AND THE COURTS 73 (1999).

<sup>36</sup> David J. Herring, *Legal Representation for the State Child Welfare Agency in Civil Child Protection Proceedings: A Comparative Study*, 24 U. TOL. L. REV. 603, 611-12 (1993).

<sup>37</sup> JOINT INTERIM TASK FORCE ON JUVENILE DEPENDENCY PROCEEDINGS, FINAL REPORT 8 (2014), available at [https://www.oregon.gov/gov/policy/Documents/LRCD/Meeting2\\_112315/Background\\_on\\_the\\_issue/ReportJointInterimTaskForceOnJuvenileDependencyProceedings.pdf](https://www.oregon.gov/gov/policy/Documents/LRCD/Meeting2_112315/Background_on_the_issue/ReportJointInterimTaskForceOnJuvenileDependencyProceedings.pdf).

<sup>38</sup> Herring, *supra* note 36, at 603.

<sup>39</sup> See, generally, Herring, *supra* note 36.

<sup>40</sup> CENTER ON CHILDREN AND THE LAW, AMERICAN BAR ASSOCIATION, STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILD WELFARE AGENCIES 1 (2004) [hereinafter *ABA Agency Representation Stds.*].

<sup>41</sup> *Id.* at 2.

<sup>42</sup> *Id.* at 3-4.

<sup>43</sup> *Id.* at 4.

<sup>44</sup> Herring, *supra* note 36; Scahill, *supra* note 35; Mimi Laver, *Agency Attorneys and Caseworkers: Working Well Together*, in CHILD WELFARE LAW AND PRACTICE 565 (Ventrell & Duquette eds., 2005); MIMI LAVER & CLAIRE SANDT, FOUNDATIONS FOR SUCCESS: STRENGTHENING YOUR AGENCY ATTORNEY OFFICE (1999); *DHHS Standards*, *supra* note 2.

<sup>45</sup> Herring, *supra* note 36.

<sup>46</sup> *Id.* at 25-27

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

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- <sup>49</sup> Ramone Ruiz and Scott Trowbridge, *National Child Welfare Resource Center on Legal and Judicial Issues: National Survey of Child Welfare Legal Representation Issues 6-7* (2009), available at [http://www.americanbar.org/content/dam/aba/administrative/child\\_law/nrclji/NationalSurveyofRepresentationModeIs.doc](http://www.americanbar.org/content/dam/aba/administrative/child_law/nrclji/NationalSurveyofRepresentationModeIs.doc).
- <sup>50</sup> *Id.*
- <sup>51</sup> *ABA Agency Representation Stds.*, *supra* note 40, at 7.
- <sup>52</sup> *Id.* at 8.
- <sup>53</sup> *Id.* at 9.
- <sup>54</sup> *Id.* at 10.
- <sup>55</sup> *Id.* at 6-7.
- <sup>56</sup> *Id.* at 14.
- <sup>57</sup> See TASK FORCE ON LEGAL REPRESENTATION IN CHILDHOOD DEPENDENCY, GOVERNMENT ATTORNEY STRUCTURED INTERVIEWS (2016) available at [http://www.oregon.gov/gov/policy/Documents/LRCD/Meeting8\\_051116/Alternative\\_Models\\_Materials/State\\_Attorney\\_Manager\\_Interview\\_Results.pdf](http://www.oregon.gov/gov/policy/Documents/LRCD/Meeting8_051116/Alternative_Models_Materials/State_Attorney_Manager_Interview_Results.pdf) [hereinafter *Govt Atty Interviews*].
- <sup>58</sup> See *Govt Atty Interviews*, *supra* note 57.
- <sup>59</sup> See TASK FORCE ON LEGAL REPRESENTATION IN CHILDHOOD DEPENDENCY, STATE SURVEY RESULTS (2015), available at <http://www.oregon.gov/gov/policy/Pages/LRCD-Meetings-and-Materials.aspx> [hereinafter *Survey Results*].
- <sup>60</sup> *ABA Agency Representation Stds.*, *supra* note 40, at 8.
- <sup>61</sup> *DHHS Standards*, *supra* note 2, at 5-6.
- <sup>62</sup> *ABA Agency Representation Stds.*, *supra* note 40, at 19.
- <sup>63</sup> See *Govt Atty Interviews*, *supra* note 57, Executive Summary (noting that “the two states with caseloads over 130 were both actively advocating for budget increases to decrease their caseload”).
- <sup>64</sup> *Id.*
- <sup>65</sup> *Id.*
- <sup>66</sup> See *Id.*
- <sup>67</sup> Scahill, *supra* note 35, at 80.
- <sup>68</sup> *ABA Agency Representation Stds.*, *supra* note 40, at 4; see also Scahill, *supra* note 35.
- <sup>69</sup> See *Govt Atty Interviews*, *supra* note 57.
- <sup>70</sup> See *Survey Results*, *supra* note 58.
- <sup>71</sup> *Id.*
- <sup>72</sup> Herring, *supra* note 36.
- <sup>73</sup> See *Govt Atty Interviews*, *supra* note 57.
- <sup>74</sup> 42 U.S.C. § 5106a(b) (2010).
- <sup>75</sup> OR. REV. STAT. § 419B.112 (2013).
- <sup>76</sup> *Id.*
- <sup>77</sup> Donald D. Duquette and Sarah H. Ramsey, *Using Lay Volunteers to Represent Children in Child Protection Court Proceedings (Appendix C)*, 10 CHILD ABUSE AND NEGLECT 293-308 (1986).
- <sup>78</sup> NATIONAL CASA FOR CHILDREN, STANDARDS FOR LOCAL CASA/GAL PROGRAMS: STANDARD 5.A.2 (2012 Ed.).
- <sup>79</sup> *Ramstead v. Morgan*, 347 P.2d 594, 601, 219 Or. 383, 399 (Or. 1959).
- <sup>80</sup> *Id.*
- <sup>81</sup> *Id.*
- <sup>82</sup> *Id.*
- <sup>83</sup> OR. REV. STAT. § 9.160 (2013).
- <sup>84</sup> Or. UTCR 3.170 (2015) (*Pro Hac Vic* Admission of out-of-state attorney).
- <sup>85</sup> OR. REV. STAT. § 9.320 (2013) (Necessity for Employment by an Attorney)(emphasis added).
- <sup>86</sup> OR. REV. STAT. § 180.060(6) (2013) (“The Attorney General shall, when requested, perform all legal services for the state or any department or officer of the state.”).
- <sup>87</sup> 2014 Or. Laws Chap. 106 (H.B. 4156, 77<sup>th</sup> Leg. Assemb., Reg. Sess. [Or. 2014]).
- <sup>88</sup> See e.g. OR. REV. STAT. § 180.060 (2013) (outlining circumstances under which Attorney General shall represent the State); *State v. Coleman*, 886 P.2d 28, 131 Or. App. 386 (1994) (holding that district attorney’s use of two assistant attorney generals to prosecute case did not violate separation of powers).
- <sup>89</sup> *Ramstead*, 219 Or. at 399.
- <sup>90</sup> See *Or. State Bar v. Security Escrows, Inc.*, 377 P.2d 334, 233 Or. 80, 87 (1962) (noting that court’s regulation of practice of law is “in the public interest”).

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<sup>91</sup> OR. REV. STAT. § 9.220 (2013).

<sup>92</sup> *Id.*

<sup>93</sup> OR. REV. STAT. § 9.527 *et seq.* (2013).

<sup>94</sup> OR. REV. STAT. § 9.112 (2013).

<sup>95</sup> *Security Escrows, Inc.*, 377 P.2d 334.

<sup>96</sup> *Or. State Bar v. Smith*, 942 P.2d 793, 149 Or. App. 171, 183 (1997), *rev. den.* 326 Or. 62 (1997).

<sup>97</sup> See, e.g., *Or. State Bar v. Wright*, 578 P.2d 1238, 280 Or. 693, 696 (1978) (drafting of pleadings, briefs, wills, contracts, and other legal instruments); *State ex rel. Or. State Bar v. Lenske*, 584 P.2d 759, 284 Or. 23, 31 (1978) (counseling clients about law matters and appearing in court or in formal proceedings as a part of the judicial process); *In re Morin*, 578 P.2d 393, 319 Or. 547, 563 (1994) (advising clients on legal decisions specific to the clients and using discretion in selecting legal documents to meet the clients' needs); *In re Devers*, 974 P.2d 191, 328 Or. 230 (1999) (negotiation on behalf of a client; drafting a settlement agreement or reviewing drafts on behalf of a client; accepting pleadings and discovery requests on behalf of a client).

<sup>98</sup> 284 at 31.

<sup>99</sup> Or. State Bar Bylaws § 20.1(C).

<sup>100</sup> *DHHS Standards*, *supra* note 2.

<sup>101</sup> *ABA Child Representation Stds supra* note 24; *ABA Parent Representation Stds supra* note 24; CENTER ON CHILDREN AND THE LAW, AMERICAN BAR ASSOCIATION, STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILD WELFARE AGENCIES, *available at* [http://www.americanbar.org/content/dam/aba/administrative/child\\_law/agency-standards.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/child_law/agency-standards.authcheckdam.pdf) (2004) [hereinafter *ABA Agency Representation Stds.*].

<sup>102</sup> OR. STATE BAR, REPORT OF THE TASK FORCE ON STANDARDS OF REPRESENTATION IN JUVENILE DEPENDENCY CASES Forward (June 2014), *available at* <http://www.osbar.org/docs/resources/juveniletaskforce/JTFR3.pdf> [hereinafter *OSB Report*].

<sup>103</sup> *ABA Agency Representation Stds.*, *supra* note 101.

<sup>104</sup> *DHHS Standards*, *supra* note 2.

<sup>105</sup> *ABA Child Representation Stds supra* note 24; *ABA Parent Representation Stds.*, *supra* note 24; *ABA Agency Representation Stds supra* note 101; *DHHS Standards supra* note 2.

<sup>106</sup> See, e.g., SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, CHILD ABUSE AND NEGLECT ATTORNEY PRACTICE STANDARDS, *available at* [http://www.dccourts.gov/internet/documents/practice\\_standards.pdf](http://www.dccourts.gov/internet/documents/practice_standards.pdf) (Feb. 2003); DIVISION OF PUBLIC DEFENDER SERVICES, STATE OF CONNECTICUT, PERFORMANCE GUIDELINES FOR COUNSEL IN CHILD PROTECTION MATTERS, *available at* [http://www.ct.gov/ocpd/lib/ocpd/Child\\_Protection/CP\\_Procedures\\_Assigned\\_Counsel/Performance\\_Standards\\_For\\_Counsel\\_In\\_Child\\_Protection\\_Matters\\_FINAL\\_AS\\_APPROVED.pdf](http://www.ct.gov/ocpd/lib/ocpd/Child_Protection/CP_Procedures_Assigned_Counsel/Performance_Standards_For_Counsel_In_Child_Protection_Matters_FINAL_AS_APPROVED.pdf); Judicial Counsel of Virginia, Standards to Govern the Appointment of Guardians *Ad Litem*, Pursuant to VA. CODE § 16.1-266 (eff. Jan. 1995), *available at* [http://www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/children/gal\\_standards\\_children.pdf](http://www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/children/gal_standards_children.pdf); LOUISIANA PUBLIC DEFENDER BOARD, TRIAL COURT PERFORMANCE STANDARDS FOR ATTORNEYS REPRESENTING PARENTS IN CHILD IN NEED OF CARE AND TERMINATION OF PARENTAL RIGHTS CASES (2011), <http://lpdb.la.gov/Supporting%20Practitioners/Standards/txtfiles/pdfs/2011%20CINC%20Standards.pdf>.

<sup>107</sup> *OSB Report*, *supra* note 102.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 1.

<sup>111</sup> *Id.*

<sup>112</sup> *Supra*, note 33 and accompanying text; *infra*, Advancing Strong Crossover Case Coordination: Recommendation #4.

<sup>113</sup> VICTOR E. FLANGO & NEAL KAUDER, NATIONAL CENTER FOR STATE COURTS, COURT PERFORMANCE MEASURES IN CHILD ABUSE AND NEGLECT CASES: KEY MEASURES III, *available at* <https://www.ncjrs.gov/pdffiles1/ojdp/223567.pdf>.

<sup>114</sup> *Id.* at v.

<sup>115</sup> *Id.* at 1.

<sup>116</sup> CENTER ON CHILDREN AND THE LAW, AMERICAN BAR ASSOCIATION, INDICATORS OF SUCCESS FOR PARENT REPRESENTATION 1 (2015), *available at* [http://www.americanbar.org/content/dam/aba/administrative/child\\_law/ParentRep/Indicators-of-Success.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/child_law/ParentRep/Indicators-of-Success.authcheckdam.pdf) [hereinafter *ABA Indicators of Success*].



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- <sup>117</sup> NATIONAL COUNSEL FOR JUVENILE AND FAMILY COURT JUDGES, A GUIDE TO INTEGRATING CONTINUOUS QUALITY IMPROVEMENTS INTO THE WORK OF COMMUNITY IMPROVEMENT COUNSELS 1 (2015).
- <sup>118</sup> Mary O'Brien & Peter Watson, National Child Welfare Resource Center for Organizational Improvement, *A Framework for Quality Assurance in Child Welfare* vii (2002), available at <http://muskie.usm.maine.edu/helpkids/rcpdfs/QA.pdf>.
- <sup>119</sup> Flango & Kauder, *supra* note 113, at v.
- <sup>120</sup> *Id.* at iii.
- <sup>121</sup> *ABA Indicators of Success*, *supra* note 115.
- <sup>122</sup> *See, e.g., id.* (describing efforts in Texas, Oklahoma, Louisiana, and Arkansas).
- <sup>123</sup> JUVENILE COURT IMPROVEMENT PROGRAM, 2012-2016 STRATEGIC PLAN 1 (2012), available at <http://courts.oregon.gov/OJD/docs/OSCA/JFCPD/Juvenile/JCIPStrategicPlan.pdf> (2012).
- <sup>124</sup> *See*, OFFICE OF PUBLIC DEFENSE SERVICES, PARENT CHILD REPRESENTATION PROJECT ANNUAL REPORT 2014-2015 (2016), available at [https://www.oregon.gov/OPDS/docs/Reports/PCRP\\_report\\_PDSC\\_Jan\\_2016.pdf](https://www.oregon.gov/OPDS/docs/Reports/PCRP_report_PDSC_Jan_2016.pdf) (reporting on performance measures such as immediate and consistent access to multidisciplinary staff, caseloads, representation out of court, shelter hearing representation, case resolution, time to permanency, and client satisfaction).
- <sup>125</sup> Flango & Kauder, *supra* note 113, at 1.
- <sup>126</sup> *Id.*
- <sup>127</sup> *Id.*
- <sup>128</sup> *ABA Indicators of Success*, *supra* note 115.
- <sup>129</sup> Flango & Kauder, *supra* note 113.
- <sup>130</sup> *Indicators of Quality Representation for Louisiana Children's and Parents' Attorneys* (2014) available at [http://www.americanbar.org/content/dam/aba/administrative/child\\_law/ParentRep/LA%20IndicatorsWeb.doc](http://www.americanbar.org/content/dam/aba/administrative/child_law/ParentRep/LA%20IndicatorsWeb.doc).
- <sup>131</sup> NATIONAL CENTER FOR STATE COURTS, COURTTOOLS: TRIAL COURT PERFORMANCE MEASURES, MEASURE 5 (2005), available at [http://www.courttools.org/~media/Microsites/Files/CourTools/courttools\\_Trial\\_measure5\\_Trial\\_Date\\_Certainty.ashx](http://www.courttools.org/~media/Microsites/Files/CourTools/courttools_Trial_measure5_Trial_Date_Certainty.ashx).
- <sup>132</sup> NATIONAL CENTER FOR STATE COURTS, COURTTOOLS: TRIAL COURT PERFORMANCE MEASURES, MEASURE 1 (2005), available at [http://www.courttools.org/~media/Microsites/Files/CourTools/courttools\\_Trial\\_measure1\\_access\\_and\\_fairness.ashx](http://www.courttools.org/~media/Microsites/Files/CourTools/courttools_Trial_measure1_access_and_fairness.ashx).
- <sup>133</sup> DENISE HERZ, PHILIP LEE, LORRIE LUTZ, MACON STEWART, JOHN TUELL & JANET WIIG, CENTER FOR JUVENILE JUSTICE REFORM & ROBERT F. KENNEDY CHILDREN ACTIONS CORPS, ADDRESSING THE NEEDS OF MULTISYSTEM YOUTH: STRENGTHENING THE CONNECTION BETWEEN JUVENILE JUSTICE AND CHILD WELFARE 2 (2012), available at [http://cjjr.georgetown.edu/wp-content/uploads/2015/03/MultiSystem\\_Youth\\_March2012.pdf](http://cjjr.georgetown.edu/wp-content/uploads/2015/03/MultiSystem_Youth_March2012.pdf); LORI LUTZ, MACON STEWART & DENISE HERZ, CENTER FOR JUVENILE JUSTICE REFORM & CASEY FAMILY PROGRAMS, CROSSOVER YOUTH PRACTICE MODEL 6.
- <sup>134</sup> Herz et al., *supra* note 133, at iii.
- <sup>135</sup> *Id.*
- <sup>136</sup> *Id.* at 17.
- <sup>137</sup> *Id.* at 17-18.
- <sup>138</sup> Lutz et al., *supra* note 133, at 8.
- <sup>139</sup> NATIONAL JUVENILE DEFENDER CENTER, INNOVATION BRIEF: ADDRESSING THE LEGAL NEEDS OF YOUTH AFTER DISPOSITION 1 (2014), available at <http://njdc.info/wp-content/uploads/2014/01/Post-Dispo-Inno-Brief-2013.pdf>.
- <sup>140</sup> Herz et al., *supra* note 133, at 2.
- <sup>141</sup> *E.g., id.* at 4.
- <sup>142</sup> *E.g., id.* at 5.
- <sup>143</sup> Lutz et al., *supra* note 133 at 8.
- <sup>144</sup> National Juvenile Defender Center, *supra* note 139, at 2 (citing to National Juvenile Defense Standard 7.1).
- <sup>145</sup> WILLIAM FEYERHERM & SANDY JOHNSON, JUVENILE JUSTICE AND CHILD WELFARE: ESTIMATES OF THE CROSSOVER BETWEEN OREGON'S SYSTEMS, A REPORT FOR THE YOUTH DEVELOPMENT COUNCIL 5 (2012).
- <sup>146</sup> *Id.* at 5-7.
- <sup>147</sup> *Id.*
- <sup>148</sup> *Id.* at 8.
- <sup>149</sup> *Id.* at 11.
- <sup>150</sup> *Id.*
- <sup>151</sup> OR. STATE BAR PERFORMANCE STANDARD FOR REPRESENTATION IN JUVENILE DELINQUENCY CASES 9.5 (2014), available at [http://www.osbar.org/\\_docs/resources/juveniletaskforce/JTFR3.pdf](http://www.osbar.org/_docs/resources/juveniletaskforce/JTFR3.pdf).

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- <sup>152</sup> JOINT INTERIM TASK FORCE ON JUVENILE DEPENDENCY PROCEEDINGS, FINAL REPORT 4 (2014), available at [https://www.oregon.gov/gov/policy/Documents/LRCD/Meeting2\\_112315/Background\\_on\\_the\\_issue/ReportJointInterimTaskForceOnJuvenileDependencyProceedings.pdf](https://www.oregon.gov/gov/policy/Documents/LRCD/Meeting2_112315/Background_on_the_issue/ReportJointInterimTaskForceOnJuvenileDependencyProceedings.pdf).
- <sup>153</sup> COURT DEPENDENCY WORK GROUP, JUVENILE COURT DEPENDENCY PROCEEDINGS FINAL REPORT 11 (2014).
- <sup>154</sup> NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, KEY PRINCIPLES FOR PERMANENCY PLANNING FOR CHILDREN 1 (2011), available at [http://www.ncjfcj.org/sites/default/files/keyprinciples.final\\_permplanning.pdf](http://www.ncjfcj.org/sites/default/files/keyprinciples.final_permplanning.pdf) [hereinafter *Principles for Permanency Planning*].
- <sup>155</sup> U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCY FOR CHILDREN, IV-2 (1999).
- <sup>156</sup> *Principles of Permanency Planning*, supra note 154 at 2.
- <sup>157</sup> ALICIA DEVAULT, LORIE SICAFUSE & ALICIA SUMMERS, RESEARCH REPORT: 2014 CHILD ABUSE AND NEGLECT INSTITUTE IN RENO, NV 5 (2014), available at <https://rcdvcpc.org/view-resources-temporary/43-research-report-2014-child-abuse-and-neglect-institute.html>.
- <sup>158</sup> *Permanency Planning 2*, supra note 156.
- <sup>159</sup> Suellyn Scarnecchia, Melissa Breger, Frank E. Vandervort, & Naomi Woloshin, *Building Pediatric Law Careers: The University of Michigan Law School Experience*. 34 FAM. L. Q. 531, 531 (2000).
- <sup>160</sup> See, e.g., University of Michigan Child Advocacy Law Clinic, <http://www.law.umich.edu/clinical/calc/Pages/default.aspx> (last visited July 17, 2015); University of South Carolina Children's Law Concentration Program, [http://www.law.sc.edu/clinical\\_legal\\_education/description.shtml](http://www.law.sc.edu/clinical_legal_education/description.shtml) (last visited July 17, 2015); New York University Family Defense Clinic, <http://www.law.nyu.edu/sites/default/files/2016-17-Clinic-Packet-March-2.pdf> (last visited July 17, 2015); University of Nevada Las Vegas, Family Justice Clinic, <https://law.unlv.edu/clinics> (last visited July 17, 2015).
- <sup>161</sup> Scarnecchia et al., supra note 159; Donald N. Duquette, *Developing a Child Advocacy Law Clinic: A Law School Clinical Legal Education Opportunity*, 31 U MICH. J.L REFORM 1 (1997); Christina Zawisza, *Two Heads Are Better Than One: The Case-Based Rationale for Dual Disciplinary Teaching in Child Advocacy Clinics*, 7 FLA. COSTAL L. REV. 631, 631 (2006).
- <sup>162</sup> See, e.g., supra note 160.
- <sup>163</sup> DEPARTMENT OF HUMAN SERVICES, CHILD WELFARE DATABOOK 16 (2015), available at <https://www.oregon.gov/DHS/CHILDREN/CHILD-ABUSE/Documents/2014-data-book.pdf> [hereinafter *Databook*].
- <sup>164</sup> GOVERNOR'S TASK FORCE ON DISPROPORTIONALITY IN CHILD WELFARE, FINAL REPORT 4 (2011), available at <https://www.oregon.gov/DHS/DHSNEWS/CWIndependentReview/gov-taskforce-report-3-11.pdf>.
- <sup>165</sup> *Id.* at 13.
- <sup>166</sup> 25 U.S.C. § 1911 (1978).
- <sup>167</sup> 25 U.S.C. § 1912 (b).
- <sup>168</sup> 25 U.S.C. § 12912 (d)-(f).
- <sup>169</sup> 25 U.S.C. § 1911(c).
- <sup>170</sup> *State ex rel. Juvenile Dep't of Lane County v. Shuey*, 119 Ore. App. 185 (1993).
- <sup>171</sup> *Databook*, supra note 163, at 17.
- <sup>172</sup> *Id.* at 16-17.
- <sup>173</sup> DAVID E. SIMMONS, FIRST FOCUS, SPARC & NATIONAL INDIAN CHILD WELFARE ASSOCIATION, IMPROVING THE WELL-BEING OF AMERICAN INDIAN AND ALASKA NATIVE FAMILIES THROUGH STATE-LEVEL EFFORTS TO IMPROVE ICWA COMPLIANCE (2014), available at <http://childwelfaresparc.org/wp-content/uploads/2014/10/Improving-the-Well-being-of-American-Indian-and-Alaska-Native-Children-and-Families.pdf>.

# Annual Report 2015-2016

## PARENT CHILD REPRESENTATION PROGRAM

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**Public Defense Services Commission ♦ Office of Public Defense Services**  
1175 Court St. NE ♦ Salem, OR 97301 ♦ [www.oregon.gov/opds](http://www.oregon.gov/opds) ♦ Phone: 503-378-3349



# Parent Child Representation Program

## Annual Report 2015-2016

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## The importance of legal advocacy: Patricia's story

In February 2015, my 11-year old daughter, J, and 3-year-old son, D, were removed from my care and placed in a foster home. The reason they were taken from me is because of bad choices I made as a parent. I had a long history of struggling with my methamphetamine addiction. Sometimes I could keep it under control but sometimes it got the best of me. I moved my family to Oregon from another state to try to escape my drug-involved lifestyle and, for a few months, was clean and sober in Oregon. Then, things got really bad. I was using a lot, smoking in front of my children, and frequently had unsafe people in my home around my children.

The police came to my house and searched it, I was charged with possession of a controlled substance, and DHS removed my children. I was clean for a week and then started using again.

I had never been in any kind of trouble before, never had a lawyer, and did not know what to expect in my case. All I knew is that my children were in a stranger's care and I wanted to get clean and sober for them. At the shelter hearing in my case, I was appointed an attorney. He eased my anxiety and encouraged me to get help. I did that, moving first into clean and sober housing and then starting family treatment court where I was required to participate in services and do treatment.

It was pretty easy once I got my head on straight. I was fortunate. My children were with a foster parent who turned out to be a wonderful support for my family. And, I was paired with a case manager as part of my juvenile defense team.

## Introduction

Decisions made in dependency courtrooms have far reaching consequences for Oregon's vulnerable children and families.<sup>1</sup> Few legal proceedings immediately affect an individual's rights more than a juvenile dependency case where children may be removed from their home, parents, and siblings. This intervention has long-lasting effects on the well-being of children.<sup>2</sup>

Competent legal representation for parents and children is correlated with improved outcomes. Effective parent and child representation has been shown to: reduce unnecessary removals of children, decrease time to reunification, decrease re-entry following reunification, decrease time to other forms of permanency and ensure more frequent and appropriate services are provided.<sup>3</sup>

Attorneys serve as guides, advocates, translators, and counselors and play an important role in ensuring fairness and equity. Parent's and children's attorneys must protect the rights of their clients in the courtroom and in decision-making meetings throughout the life of the dependency case. Strong advocacy is critically important in the dependency system, where cases are

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<sup>1</sup> *Oregon Task Force on Dependency Representation Final Report*, 3 (June 2016)

[https://www.oregon.gov/gov/policy/Documents/LRCD/Oregon\\_Dependency\\_Representation\\_TaskForce\\_Final\\_Report\\_072516.pdf](https://www.oregon.gov/gov/policy/Documents/LRCD/Oregon_Dependency_Representation_TaskForce_Final_Report_072516.pdf).

<sup>2</sup> *Id.* at 16.

<sup>3</sup> Center on Children and the Law, American Bar Association, *Investment that Makes Sense* [http://www.americanbar.org/content/dam/aba/administrative/child\\_law/ParentRep/At-a-glance%20final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/child_law/ParentRep/At-a-glance%20final.authcheckdam.pdf), Thorton and Gwin, *High-Quality Legal Representation for Parents in Child Welfare Cases Result in Improved Outcomes for Families and Potential Cost Savings* 46 Fam. L.Q. 1390154 (Spring 2012), Courtney, Hook & Orme, Partners for Our Children, *Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes for Children in Foster Care* [https://partnersforourchildren.org/sites/default/files/2011\\_evaluation...impact\\_of\\_enhanced\\_parental\\_legal\\_representation...discussion\\_paper.pdf](https://partnersforourchildren.org/sites/default/files/2011_evaluation...impact_of_enhanced_parental_legal_representation...discussion_paper.pdf), Center for Family Representation, *2013 Report to the Community* <https://www.cfrny.org/wp-content/uploads/2013/11/CFR-2013-Report-to-the-Community.pdf>.

The case manager stayed by my side, checking in on me regularly to ensure I was receiving services and that my kids needs were being met and that I was having visits with my children. It was such a comfort to know that my case manager was on my side and would advocate for what my family needed.

I graduated from treatment, moved into my own place, and my children were returned to me 11 months after they were removed. My attorney strongly advocated for reunification and worked with me to make sure everything was in place to make sure the reunification was successful. Looking back, I recognize that the support of my case manager and strong advocacy by my attorney were two crucial things that helped get my family back together.

prosecuted inconsistently, and disproportionately impact poor families.<sup>4</sup>

Improved outcomes not only benefit families; they translate into cost savings and system efficiencies. For example, Washington State's Parent Representation Program, which ensures competent and effective legal representation for parents in juvenile dependency cases, saves \$7.5 million per year by reducing the length of time children spend in foster care.<sup>5</sup>

In 2013, the Oregon Legislative Assembly provided funding to the Office of Public Defense Services to develop an enhanced legal representation program in Oregon. This program, the Parent Child Representation Program (PCRP), is both a response to

<sup>4</sup> Guggenheim and Sankaran, *Representing Parents in Child Welfare Cases: Advice and Guidance for Family Defenders*, xx and 21 (2015).

<sup>5</sup> Center on Children and the Law, American Bar Association, *Investment that Makes Sense* [http://www.americanbar.org/content/dam/aba/administrative/child\\_law/ParentRep/At-a-glance%20final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/child_law/ParentRep/At-a-glance%20final.authcheckdam.pdf).

a longstanding history of deficient legal representation in juvenile dependency cases<sup>6</sup> and a desire to achieve results similar to those observed in Washington State. The PCRP is designed to improve legal representation for parents and children through reduced attorney caseloads, rigorous quality assurance, and, in complex cases, the use of social workers<sup>7</sup> as part of the legal representation team. The PCRP is modeled on the highly successful Washington State Parent Representation program, which, over the past 16 years, has increased the speed at which children achieve permanency and reduced the use of foster care.<sup>8</sup>

Linn and Yamhill counties were initially selected as the pilot PCRP sites. The program began in August 2014 and, with cost savings gained in the two initial counties, was expanded to Columbia County in January 2016. At the end of the first year of the PCRP, OPDS published the first annual report which assessed the program's effectiveness through a variety of quantitative and qualitative data measures. The first-year findings show an increase in family reunifications and a reduction in the use of foster care.<sup>9</sup>

<sup>6</sup> Concerns about the quality of representation of parents and children in juvenile court have been ongoing for nearly two decades. See OSB 2000 Indigent Defense Task Force III Report, [https://www.osbar.org/\\_docs/idthf/idthf3.pdf](https://www.osbar.org/_docs/idthf/idthf3.pdf), Office of the Secretary of the State 2005 OPDS Audit <http://sos.oregon.gov/Documents/audits/management/2005/404-2005-02-01.pdf>, *Oregon Task Force on Dependency Representation Final Report*, 3 (June 2016) [https://www.oregon.gov/gov/policy/Documents/LRCD/Oregon\\_Dependency\\_Representation\\_TaskForce\\_Final\\_Report\\_072516.pdf](https://www.oregon.gov/gov/policy/Documents/LRCD/Oregon_Dependency_Representation_TaskForce_Final_Report_072516.pdf).

<sup>7</sup> Because the term "social worker" is a protected term requiring licensure, within the PCRP the term "case manager" is used to denote social service professionals who serve on the legal team.

<sup>8</sup> Courtney, Hook & Orme, Partners for Our Children, *Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes for Children in Foster Care* [https://partnersforourchildren.org/sites/default/files/2011\\_evaluation\\_impact\\_of\\_enhanced\\_parental\\_legal\\_representation....discussion\\_paper.pdf](https://partnersforourchildren.org/sites/default/files/2011_evaluation_impact_of_enhanced_parental_legal_representation....discussion_paper.pdf).

<sup>9</sup> *Parent Child Representation Program Annual Report 2014-2015* [https://www.oregon.gov/OPDS/docs/Reports/PCRP\\_report\\_PDS\\_C\\_Jan\\_2016.pdf](https://www.oregon.gov/OPDS/docs/Reports/PCRP_report_PDS_C_Jan_2016.pdf).

## Summary

This report, the second Parent Child Representation Program Annual Report, utilizes the same methodology as its predecessor. The report relies on seven key indicators and fifteen data measures to assess the PCRP. The majority of indicators within the PCRP report were recommended by the American Bar Association's 2015 evaluation tool for legal representation in dependency cases, *Indicators of Success for Parent Representation*, which was developed, validated and tested by eight states over a three-year period.<sup>10</sup>

An annual report is a necessary part of the continuous quality improvement process: it is the first step toward establishing benchmarks, identifying trends, and initiating data-driven quality improvement principles to guide the program's growth. The data is intended to show the quality of legal representation provided, and to assess whether the PCRP's system changes are associated with positive effects. Caution should be used when interpreting the data described within the report; there are a number of factors which contribute to the overall effectiveness of the juvenile dependency system, including judicial resources, caseworker staffing and turnover, available services, the scarcity of foster homes, laws and regulations, and local culture. In addition, in the PCRP counties and across the state, a number of programs and reform initiatives have started, ended or are underway.<sup>11</sup>

This report is organized by program goals: to provide competent and effective legal representation throughout the life of the case; to provide meaningful representation of parents and children at all proceedings; and to improve outcomes for children and families. Linn and Yamhill counties are included in all measures. Columbia County is included where

specifically indicated. This is because the program has been operating in the county for only six months and for some data points a year or more of data is required.<sup>12</sup> Many of the report's graphs include data for PCRP counties and similarly sized counties. The comparable counties are included to allow the reader to better understand and compare trends.

## Notable Observations

The 2015-2016 PCRP Annual Report builds on the promising findings in the 2014-2015 Report. Over the past year, along with improved legal representation, the most notable observations are: a reduction in the use of foster care, an increase in family reunification, and expedited permanency. Caution should be used when interpreting the results of this report; the observations do not prove a causal relationship between legal representation and improved results. However, over the past two years, the observations suggest an encouraging link between quality legal representation and positive outcomes for families.

Within this report, improved legal representation is measured by access to multi-disciplinary staff, case preparation and presentation efforts, caseload limits, time spent with clients, attorney presence at case planning meetings, attorney advocacy at shelter hearings, and client satisfaction.

When compared to non-PCRCP attorneys, the PCRCP attorneys are more frequently investigating cases and, where appropriate, utilizing experts in presenting their case to the court. Since the inception of the program in 2014, PCRCP attorneys utilize investigators eight times and experts ten times more frequently than non-PCRCP attorneys. In addition, the PCRCP attorneys have access to case managers, social service professionals, on complex cases and are the only Oregon public defense attorneys with explicit caseload limits.

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<sup>10</sup> American Bar Association Center on Children and the Law, *Indicators of Success for Parent Representation* (2015) [http://www.americanbar.org/content/dam/aba/administrative/child\\_law/ParentRep/Indicators-ofSuccess.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/child_law/ParentRep/Indicators-ofSuccess.authcheckdam.pdf).

<sup>11</sup> Some of these programs include: DHS Family Find, 2015 changes in federal law eliminating APPLA as a permanency plan for some children, expansion of guardianship assistance, Permanency Roundtables, DHS differential response, and enhanced DHS legal representation.

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<sup>12</sup> Although Columbia county is not included in outcome data, the raw data is contained within the graphs in the report. For example, this report indicates time to reunification has decreased and the percentage of children achieving permanency in 24 months has increased. *See a. Median time to reunification page 16, and c. Time to achieve permanency page 18.*

PCRCP attorneys record their time and activities and are expected to spend approximately 1/3 of their time in client contact outside of court. From July 2015-June 2016, the 21 attorneys in the PCRCP program spent an average of 27% of their time meeting with clients.

PCRCP attorneys are also expected to attend meetings where critical case planning decisions are made. Because the juvenile court system is an amalgamation of law and social work, parties and stakeholders typically meet, out of court, to make case planning decisions. The Department of Human Services is required to hold case planning meetings at certain intervals throughout the case. Complex cases may necessitate additional service-delivery-focused meetings.

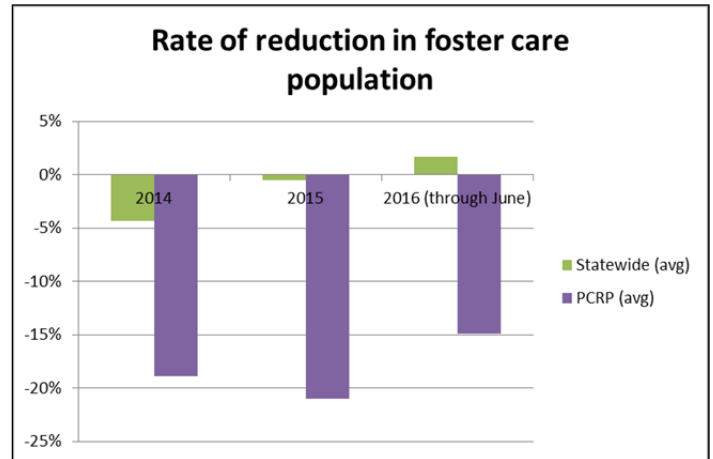
Advocacy, on behalf of parents and children, is essential at case related meetings. Without the presence of attorneys, parents and, in some cases, children would be required to attend these meetings alone and be expected to share information, participate in developing solutions, and posit options for case planning. Attorneys protect the rights of parents and children and increase the effectiveness of case planning meetings. From July 2015-June 2016, PCRCP attorneys in Linn, Yamhill and Columbia counties attended a total of 1766 case-related meetings, an average of 11 meetings per month per attorney.

Prior to the PCRCP, attorneys in the pilot counties were not consistently present at shelter hearings and, as a result, parents attended these hearings, where children were usually removed from their care, without an advocate. Between July 2015 and June 2016, PCRCP attorneys were present on behalf of all parties, at 92% of the shelter hearings.

Clients also recognize the benefits of competent and effective legal representation. From July 2015-June 2016, 95% of clients report satisfaction with their attorney's handling of their case.

For the second consecutive year of the PCRCP, the foster care population in Linn and Yamhill counties declined at a rate greater than the statewide rate. In 2015, the number of children in foster care in the

PCRCP counties decreased by an average of 21% while the statewide decrease was .5%. From January-June 2016, the number of children in foster care in the PCRCP counties decreased by an average of 15% while the number of children in care statewide *increased* by 2%.<sup>13</sup>



In the PCRCP counties from 2015-June 2016, the number of months to reunification declined while the percentage of cases resulting in reunification increased. Children in PCRCP counties are spending an average of 5 fewer months awaiting reunification while across the state children are spending an additional month awaiting the same outcome.<sup>14</sup> In PCRCP counties, the reunification rate has increased 12% (to 68%) while the statewide rate increased 3% (to 63%).<sup>15</sup>

In the PCRCP, the percentage of children achieving permanency within 24 months of removal has been growing and now exceeds the statewide average. In the first half of 2016, 69% of children in Linn county and 74% in Yamhill achieved permanency in 24 months. The statewide average is 64% for the same time frame.<sup>16</sup>

<sup>13</sup> See e. Indicator: Number of children in foster care, page 20.

<sup>14</sup> See a. Median time to reunification, page 16.

<sup>15</sup> See II. Indicator: Case resolution, page 13.

<sup>16</sup> See c. Time to achieve permanency, page 18.



# PCRP Program Goal: Competent and Effective Legal Representation Throughout the Life of the Case

## I. Indicator: Immediate and consistent access to multi-disciplinary staff

### a. Access to and use of case managers

*Measure:* Percentage of attorneys that have access to case managers as part of the legal team and percentage of cases in which a case manager is used.<sup>17</sup>

*Explanation:* When lawyers and social workers collaborate to help parents succeed in reunifying with their children, the entire child welfare system benefits. The use of social workers as part of the legal representation team is recommended by the American Bar Association, the National Juvenile Defender Center, the National Association of Counsel for Children, and the Oregon State Bar.<sup>18</sup>

Case managers, who fulfill a function similar to a social worker, are working closely with PCRP attorneys to assess and address client needs, motivate parents, develop alternative safety and visitation plans, and identify solutions to expedite permanency for children. Case managers are a limited resource, and typically help resolve issues during a particularly difficult stage of a case, rather than throughout the entire case. Case managers report that the most common challenges faced by clients are: distrust of DHS, inconsistency in DHS decision-making, lack of clarity regarding expectations, inaccessible community resources due to transportation or waiting lists, homelessness, and lack of suitable placements for children.

*Data:* In the PCRP, case managers work as part of the legal team on 10-15% of open cases and are available to work with clients from the moment an attorney is appointed. From July 2015 through June 2016, PCRP case managers served 179 clients, an increase of 29 clients over the previous year.

During 2015-2016, 100% of the PCRP attorneys had access to case managers as part of the legal representation team.<sup>19</sup> During the same period, 7% of the juvenile attorneys who represented parents and children in dependency cases statewide had readily available access to social workers or case managers.<sup>20</sup>

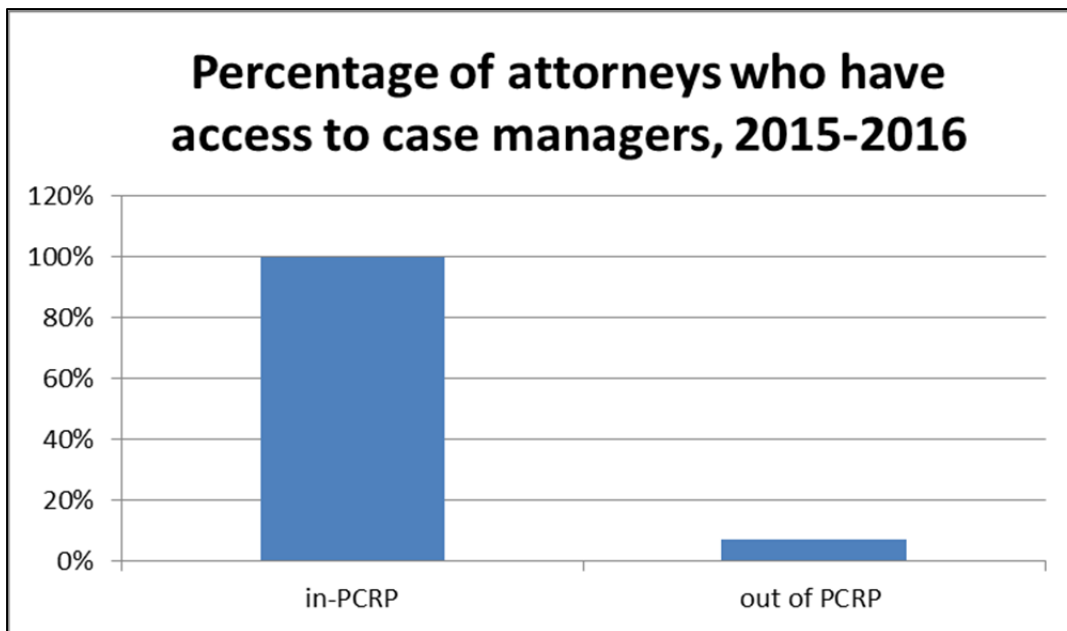
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<sup>17</sup> Data sources: PCRP attorney activity reports, case manager assignment spreadsheet, OPDS contract analysts.

<sup>18</sup> See American Bar Association, *Standards of Practice for Attorneys Representing Parents* [http://www.americanbar.org/content/dam/aba/publications/center\\_on\\_children\\_and\\_the\\_law/parentrepresentation/parent\\_standards\\_pssed.doc](http://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/parentrepresentation/parent_standards_pssed.doc), National Juvenile Defender Center, *Juvenile Defense Standards* <http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf>, National Association of Counsel for Children, *Recommendations for Representation of Children* [http://c.ymcdn.com/sites/www.naccchildlaw.org/resource/resmgr/Standards/NACC\\_Standards\\_and\\_Recommend.pdf](http://c.ymcdn.com/sites/www.naccchildlaw.org/resource/resmgr/Standards/NACC_Standards_and_Recommend.pdf), Oregon State Bar Report of the Task Force on Standards of Representation in Juvenile Dependency Cases (2014) [http://www.osbar.org/\\_docs/resources/juveniletaskforce/JTFR3.pdf](http://www.osbar.org/_docs/resources/juveniletaskforce/JTFR3.pdf).

<sup>19</sup> In a handful of non-PCRP jurisdictions, juvenile attorneys have access to social service professionals. A limited number of public defender offices maintain a social worker on staff. Klamath Defenders, the public defense provider in Klamath and Lake counties, utilize case managers in a role similar to that of the PCRP.

<sup>20</sup> Data source: Contractor Survey 2015, OPDS contract analysts.



**b. Access to and use of expert witnesses**

*Measure:* Percentage of attorneys that have access to expert witnesses and percentage of cases in which an expert witness is requested and determined by OPDS to warrant funding as a necessary and reasonable expense.<sup>21</sup>

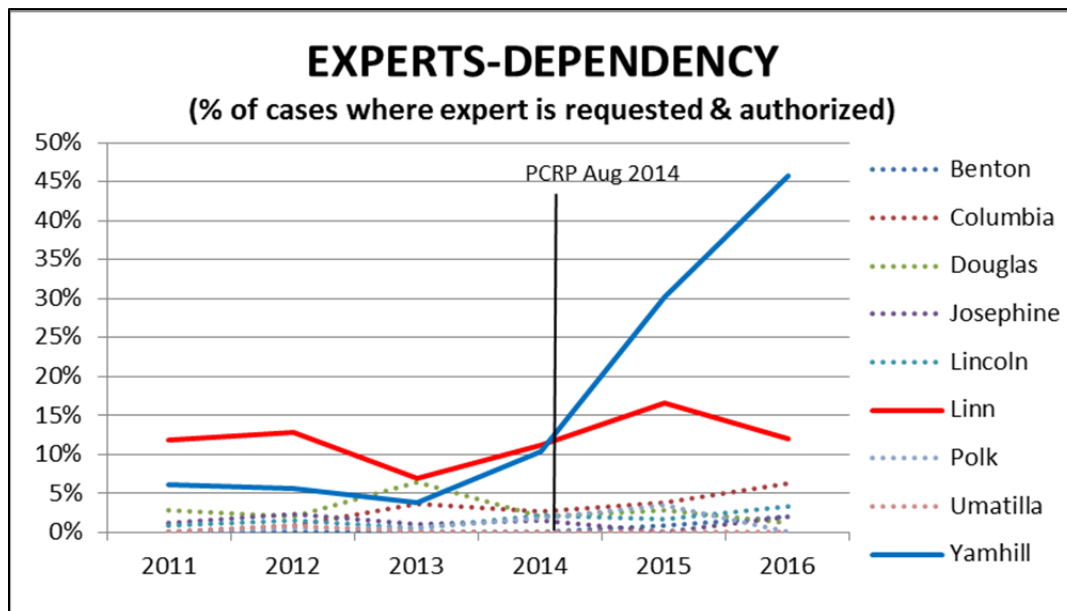
*Explanation:* Each attorney must have access to independent expert analysis to assess and present the client’s case and to challenge the state’s case. The right to court appointed counsel at state expense includes necessary and reasonable fees and expenses for the investigation, preparation, and presentation of the case.<sup>22</sup>

*Data:* All juvenile public defense attorneys have access to non-routine expense funds for case investigation, preparation, and presentation. In order to receive funding authorization, the attorney must document that the funds are both necessary and reasonable in the case at issue. Although all juvenile attorneys may access funds for experts, this resource is not widely utilized. In the PCRCP, attorneys are expected to request these resources where appropriate.

During 2014, in comparably sized counties, an expert was requested and authorized by OPDS in an average of 1% of the juvenile dependency cases. In 2015 and the first-half of 2016, this number is 2%. In contrast, during 2014, in PCRCP counties, an expert was requested and authorized by OPDS in an average of 11% of the juvenile dependency cases. In 2015 this number is 23% and in the first 6 months of 2016, this number is 29%.

<sup>21</sup> Data sources: PCRCP attorney activity reports, OPDS non-routine expense data, OPDS case credit reports.

<sup>22</sup> ORS 135.055(3)(a) (2015).



**c. Access to and use of investigators**

*Measure:* Percentage of attorneys that have access to investigators and percentage of cases in which an investigator is requested and determined by OPDS to warrant funding as a necessary and reasonable request.<sup>23</sup>

*Explanation:* Each attorney must independently investigate the state’s allegations and seek evidence that challenges the state’s case. The right to court appointed counsel at state expense includes necessary and reasonable fees and expenses for the investigation, preparation, and presentation of the case.<sup>24</sup>

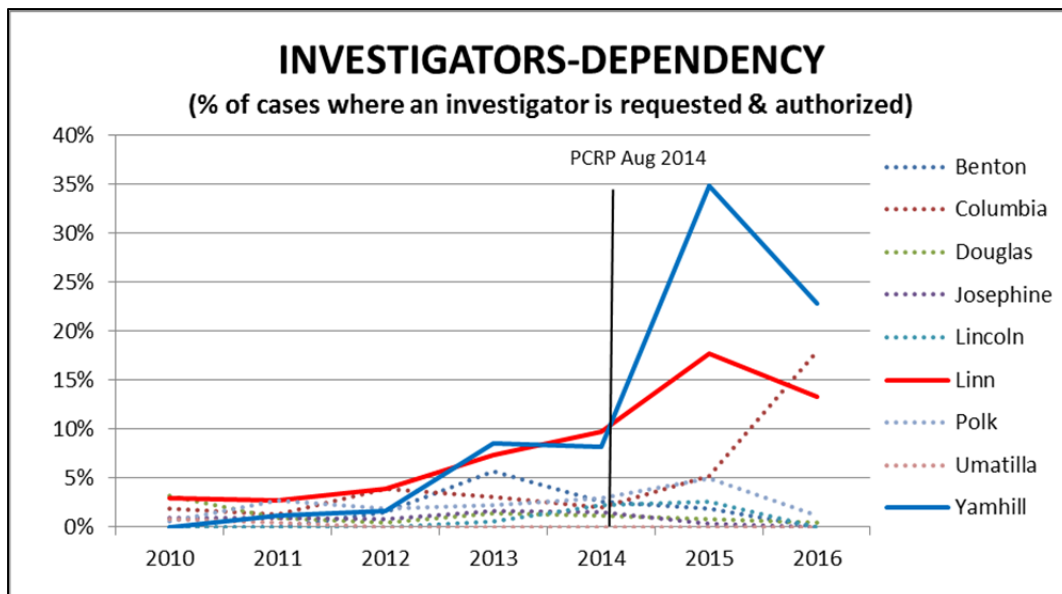
*Data:* All juvenile public defense attorneys have access to non-routine expense funds for case investigation, preparation, and presentation. In order to receive funding authorization, the attorney must document that the funds are both necessary and reasonable in the case at issue. Although all juvenile attorneys may access funds for investigators, this resource is not widely utilized. In the PCRP, attorneys are expected to request these resources where appropriate.

During 2014, 2015 and through June 2016, in comparable counties, an investigator was requested and authorized by OPDS in an average of 2% of the juvenile dependency cases. In contrast, during 2014, in PCRP counties, an investigator was requested and authorized by OPDS in an average of 9% of the juvenile dependency cases and in 2015 this number is 26%. In the first six months of 2016, this number is 18%.

<sup>23</sup> Data sources: PCRP attorney activity reports, OPDS non-routine expense data, OPDS case credit reports.

<sup>24</sup> ORS 135.055(3)(a) (2015).





## II. Indicator: Reasonable caseloads

*Measure:* Caseload limit for full- and part-time PCRPR attorneys; percentage of PCRPR attorneys who fall within the limit.<sup>25</sup>

*Explanation:* Mechanisms to control attorney caseload are one of—if not the—most important components of strong parent and child representation.<sup>26</sup> A reasonable workload allows attorneys to provide standards-based legal representation and meet their ethical obligations. The current statewide model legal for representation, with the exception of the PCRPR, is funded at 60% of the need.<sup>27</sup> As a result, attorneys struggle with high caseloads and are forced to triage work, at the expense of outcomes for clients, to accommodate existing resources.

*Data:* Within the PCRPR, attorneys are limited to a full caseload of no more than 80 open cases. The PCRPR caseload limitation requires attorneys to limit the number of non-PCRPR cases they handle, including privately retained work, so that they remain within the case limit. Lawyers within the PCRPR are expected to have frequent client contact, attend all case-related meetings, conduct independent investigations throughout the life of the case, and advocate at all court and Citizen Review Board hearings at every stage of the case.

During 2015-2016, juvenile attorneys in two of Oregon’s 36 counties, Linn and Yamhill, were subject to a caseload limit of 80 open cases. Columbia county joined the PCRPR in 2016 and the

<sup>25</sup> Data source: PCRPR attorney activity reports, Oregon Child Welfare Data Set report CM.02 Count of Children in Foster Care by Placement Type-Last Day of Period, [https://rom.socwel.ku.edu/Oregon\\_Public/MyReports.aspx](https://rom.socwel.ku.edu/Oregon_Public/MyReports.aspx).

<sup>26</sup> Laver, *American Bar Association Children’s Rights Litigation, Improving Representation for Parents in the Child-welfare system* (Oct. 2013) <http://apps.americanbar.org/litigation/committees/childrights/content/articles/fall2013-1013-improving-representation-parents-child-welfaresystem.html>; Duquette and Darwall, *Child Representation in America: Progress Report from the National Quality Improvement Center*, 41 Fam. L.Q. 87, 113-14 (Spring 2009).

<sup>27</sup> This assumes that the need is a caseload of 80 cases for all attorneys representing parents and children. However, in rural jurisdictions, 80 cases is too high and even in non-rural areas, 80 cases is a significant workload. Nationally, caseload limits in dependency cases range from 60 to 100, with most falling in between. See *American Bar Association Parent Attorney National Compensation Survey* (2015) [https://www.oregon.gov/gov/policy/Documents/LRCD/Meeting1\\_102815/National/Parent\\_representation/2015\\_Parent\\_Attorney\\_Compensation\\_Survey.pdf](https://www.oregon.gov/gov/policy/Documents/LRCD/Meeting1_102815/National/Parent_representation/2015_Parent_Attorney_Compensation_Survey.pdf).

attorneys there are subject to the same caseload caps. In the remainder of the counties, attorneys did not experience explicit caseload limits.<sup>28</sup>

### III. Indicator: Representation out of court

#### a. Time spent in contact with clients outside of court hearings

*Measure:* Time spent with clients, outside of the courtroom, as reported by the PCRCP attorneys and PCRCP case managers.<sup>29</sup>

*Explanation:* Establishing and maintaining a relationship with the child client is the foundation of representation. It is often more difficult to develop a relationship of trust with a child client than with an adult. Meeting with the child personally and regularly allows the lawyer to develop a relationship with the client and to assess the child's circumstances. The child's position, interests, needs, and wishes change over time. A lawyer for a child must develop a relationship through frequent contacts.<sup>30</sup>

Gaining a parent client's trust and establishing ongoing communication are two essential aspects of representing the parent. The job of the lawyer extends beyond the courtroom. The lawyer should be a counselor as well as litigator. The lawyer should be available to talk with the parent to prepare for hearings, and to provide advice and information about ongoing case concerns.<sup>31</sup>

*Data:* The goal of the PCRCP is for attorneys to spend 1/3 of their time with clients outside of the courtroom. From July 2015-June 2016, the 21 attorneys in the PCRCP program in Linn, Yamhill and Columbia counties spent an average of 27% of their time meeting with clients. However, beginning in January 2015, case managers have worked with clients as part of the legal representation team in complicated cases. If the time case managers spend in direct service is added to the time attorneys spend with clients, an average of 48% of the time invested by the defense team from July 2015-June 2016 is spent with clients or in direct client service.

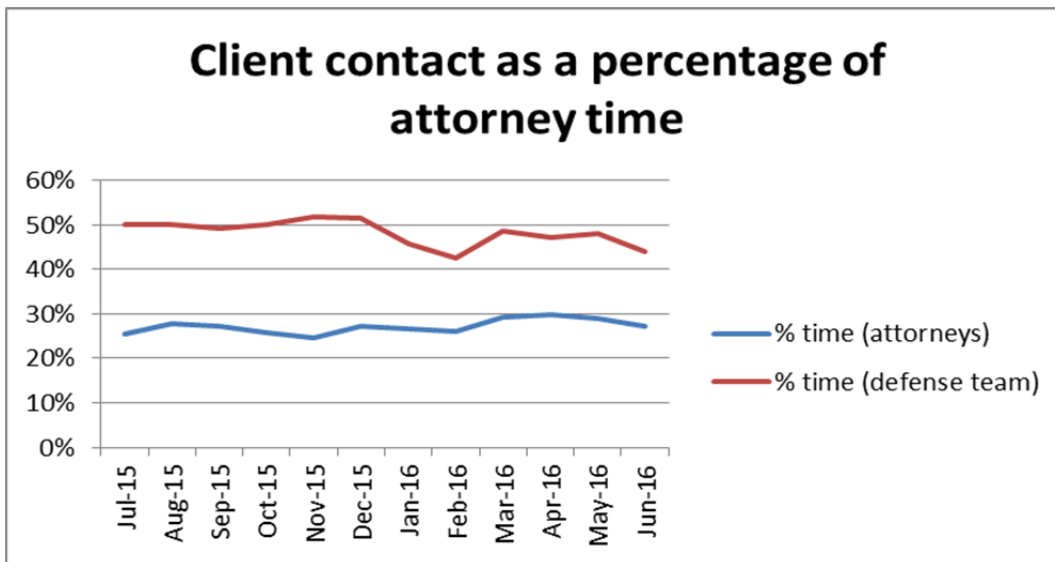
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<sup>28</sup> The issue of high caseloads for public defenders has been repeatedly identified as a concern. See *Public Defense Services Commission Retreat Agenda and Objectives* (March 20, 2014) <http://www.oregon.gov/OPDS/docs/Agendas/03-20-14.pdf>. See also *Joint Interim Task Force on Juvenile Court Dependency Proceedings Final Report* (December 3, 2014) <https://olis.leg.state.or.us/liz/201311/Downloads/CommitteeMeetingDocument/41222> (DRAFT COPY). The Oregon Governor's Task Force on Dependency Representation 2016 report recommends that all attorneys who represent parents and children in dependency cases have caseload caps. *Oregon Task Force on Dependency Representation Final Report*, 21 (June 2016) [https://www.oregon.gov/gov/policy/Documents/LRCD/Oregon\\_Dependency\\_Representation\\_TaskForce\\_Final\\_Report\\_072516.pdf](https://www.oregon.gov/gov/policy/Documents/LRCD/Oregon_Dependency_Representation_TaskForce_Final_Report_072516.pdf).

<sup>29</sup>Data source: PCRCP attorney activity reports, PCRCP case manager activity reports.

<sup>30</sup> Oregon State Bar Report of the Task Force on Standards of Representation in Juvenile Dependency Cases, *The Obligations of the Lawyer for Children in Child Protection Proceedings with Action Items and Commentary* (2014) [http://www.osbar.org/\\_docs/resources/juveniletaskforce/JTFR3.pdf](http://www.osbar.org/_docs/resources/juveniletaskforce/JTFR3.pdf).

<sup>31</sup> Oregon State Bar Report of the Task Force on Standards of Representation in Juvenile Dependency Cases, *The Obligations of the Lawyer for Parents in Child Protection Proceedings with Action Items and Commentary* (2014) [http://www.osbar.org/\\_docs/resources/juveniletaskforce/JTFR3.pdf](http://www.osbar.org/_docs/resources/juveniletaskforce/JTFR3.pdf).



### b. Attorney presence at key case non-court events

*Measure:* Number of case-related meetings attended; time spent in case-related meetings. Attorney presence at case-related meetings from a stakeholder perspective.<sup>32</sup>

*Explanation:* Lawyers should actively engage in case planning, including attending substantive case meetings, such as initial treatment planning meetings and case reviews of treatment plans.<sup>33</sup>

Many important decisions in a case are made outside of the courtroom in case-related meetings. The Department of Human Services is required to hold case planning meetings at certain intervals throughout the case and complex cases may necessitate additional meetings focused on service delivery and engagement.<sup>34</sup> These meetings are critical to case resolution and collaborative problem solving.<sup>35</sup> Therefore, advocacy at case planning meetings is an essential part of effective legal representation. PCRCP attorneys are expected to attend case-related meetings unless a court appearance is scheduled at the same time.

*Data:* From July 2015-June 2016, PCRCP attorneys in Linn, Yamhill and Columbia counties attended a total of 1766 case-related meetings, an average of 11 meetings per month per attorney. The average number of meetings is down slightly from 12 per month from the 2014-2015 year. At times, a staff assistant or case manager may attend a case-related meeting at the attorney's request. However, for purposes of this report, only attorney attendance at meetings is reported.

Although the level of PCRCP attorney participation in case-related meetings is significant, according to a multidisciplinary survey of stakeholders attendance still needs improvement. In August 2016, OPDS surveyed juvenile court stakeholders within Linn and Yamhill counties.<sup>36</sup> When asked about attorney participation in case-related meetings, 61% indicated that all or most attorneys regularly participate in out-of-court meetings.

<sup>32</sup> Data source: PCRCP attorney activity reports, August 2016 PCRCP Stakeholder survey results.

<sup>33</sup> Oregon State Bar, *supra* n. 31.

<sup>34</sup> Oregon Department of Human Services Procedure Manual Chapter II-Screening and Assessment, [https://www.dhs.state.or.us/caf/safety\\_model/procedure\\_manual/ch02/ch2-assessment-section13.pdf](https://www.dhs.state.or.us/caf/safety_model/procedure_manual/ch02/ch2-assessment-section13.pdf). Oregon Department of Human Services Procedure Manual Chapter 3-Managing child safety in and out of home, [https://www.dhs.state.or.us/caf/safety\\_model/procedure\\_manual/ch03/ch3-section6.pdf](https://www.dhs.state.or.us/caf/safety_model/procedure_manual/ch03/ch3-section6.pdf).

<sup>35</sup> *Oregon Task Force on Dependency Representation Final Report*, 12 (June 2016)

[https://www.oregon.gov/gov/policy/Documents/LRCD/Oregon\\_Dependency\\_Representation\\_TaskForce\\_Final\\_Report\\_072516.pdf](https://www.oregon.gov/gov/policy/Documents/LRCD/Oregon_Dependency_Representation_TaskForce_Final_Report_072516.pdf).

<sup>36</sup> Columbia county stakeholders will be included in the survey in 2017.

# PCRCP Program Goal: Meaningful Representation of Parents and Children at all Proceedings

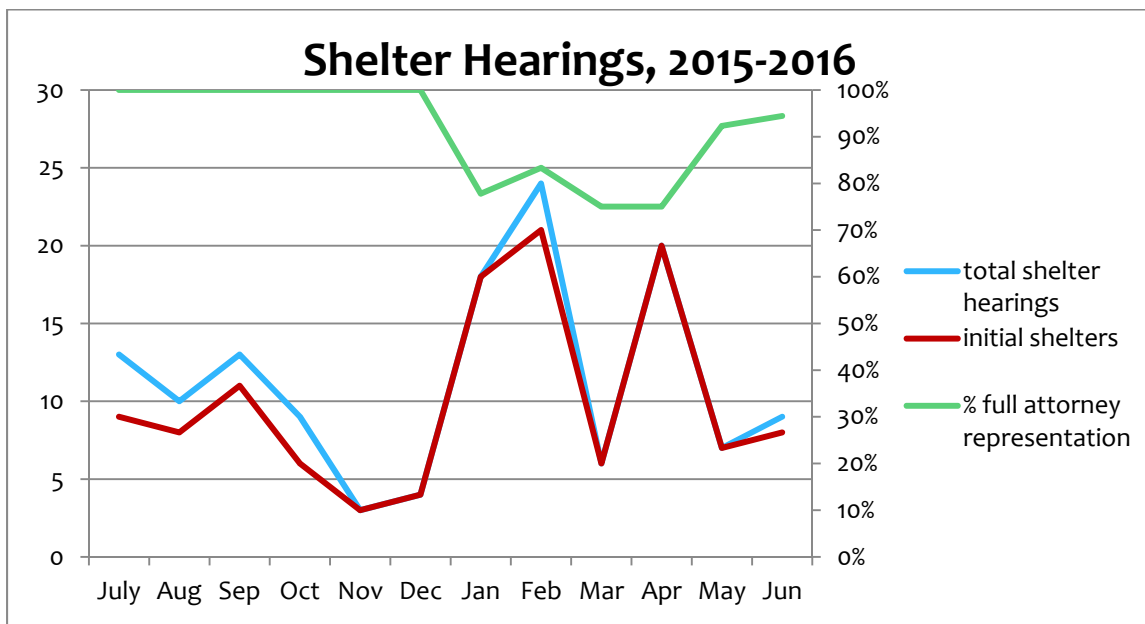
## I. Indicator: Shelter hearing representation

*Measure:* Percentage of parties represented by an attorney at shelter hearings.<sup>37</sup>

*Explanation:* PCRCP attorneys are required to provide representation at the initial hearing, called a shelter hearing, in each case. Prior to the PCRCP, attorneys in Linn, Yamhill, and Columbia counties were not consistently present at shelter hearings and, as a result, parents attended these hearings, where children were often removed from their care, without an advocate. And children, who have their own legal rights and often substantial needs, had no independent voice in the proceeding.

As a result of the PCRCP, parents and children are now consistently represented at initial shelter hearings by attorneys who have access to discovery and, in many cases, meet with their clients before the hearings. Research underscores the importance of early engagement in juvenile court cases. Families are more likely to be reunified when parents, mothers in particular, and attorneys are present and involved in early stage hearings.<sup>38</sup> Children who have attorneys appointed early in the case are more likely to achieve faster permanency.<sup>39</sup> The direction a case takes early on often predicts whether a child will return home.<sup>40</sup>

*Data:* Between July 2015 and June 2016, 92% of the time PCRCP attorneys have been present on behalf of all parties, at shelter hearings. The PCRCP program requires attorney presence at all shelter hearings. However, in Columbia County, it took nearly six months to develop a reliable and consistent process for notification, distribution of discovery, and scheduling of shelter hearings.



<sup>37</sup> Data source: PCRCP attorney activity reports, Oregon e-Court case information system.

<sup>38</sup> National Council of Juvenile and Family Court Judges, *Effects of Parental and Attorney Involvement on Reunification in Juvenile Dependency Cases*, PPCD Research Snapshot (2011)

[http://www.ncjfcj.org/sites/default/files/Parental%20Involvement%20One%20Pager\\_Final\\_0.pdf](http://www.ncjfcj.org/sites/default/files/Parental%20Involvement%20One%20Pager_Final_0.pdf).

<sup>39</sup> Orlebeke, Zhou, Skyles and Zinn, *Evaluation of the QIC-ChildRep Best Practices Model Training for Attorneys Representing Children in the Child Welfare System*, Chapin Hall at the University of Chicago (2016)

<http://www.improvechildrep.org/Portals/0/QIC-ChildRep%20Chapin%20Hall%20Evaluation.pdf>.

<sup>40</sup> Cohen and Cortese, *Cornerstone Advocacy in the First 60 Days: Achieving Safe and Lasting Reunification for Families*, American Bar Association Child Law Practice (2009).

## II. Indicator: Case resolution

*Measure:* Discharge reason for those children leaving foster care.<sup>41</sup>

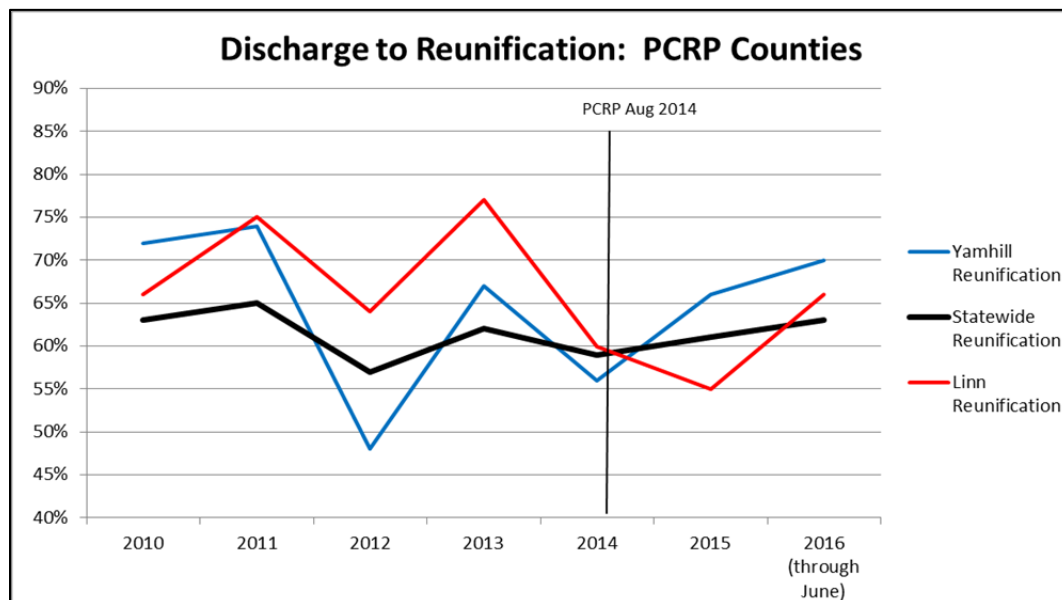
*Explanation:* High-quality legal representation for parents, where attorneys have adequate time to devote to their client's case, and parents have access to independent social workers as part of their legal team, has been shown to reduce the time children spend in foster care.<sup>42</sup> Washington State's Parent Representation Program, which began in 2000 and is similar to the PCRCP, is associated with an increase in the rate of family reunification.<sup>43</sup>

*Data:*

**Family Reunification:** The State of Oregon expresses a strong preference that children live in their own homes with their own families when possible.<sup>44</sup> In addition, foster care is a risk factor for health problems in children. Children who have been in the U.S. foster care system are at a significantly higher risk of mental and physical health problems - ranging from learning disabilities, developmental delays and depression to behavioral issues, asthma and obesity - than children who haven't experienced foster care.<sup>45</sup>

From 2014 to 2015, statewide discharge to reunification increased by 3.3%, from 59% to 61%. From 2015-June 2016, statewide discharge to reunification increased by 3%, from 61% to 63%.

In the PCRCP, from 2014 to 2015, the percentage of children leaving foster care to reunification increased by an average of 4.1% from 58% to 61%. From 2015 to June 2016, PCRCP county discharge to reunification increased by an average of 12% from 61% to 68%.



<sup>41</sup> Data source: Oregon Child Welfare Data Set report CM.05 Discharge Reason (of those discharged) [https://rom.socwel.ku.edu/Oregon\\_Public/MyReports.aspx](https://rom.socwel.ku.edu/Oregon_Public/MyReports.aspx).

<sup>42</sup> Courtney, Hook & Orme, *supra* n. 8.

<sup>43</sup> American Bar Association, *National Project to Improve Representation for Parents Fact Sheet* <http://schubert.case.edu/files/2014/02/ABAFactsheet.pdf>.

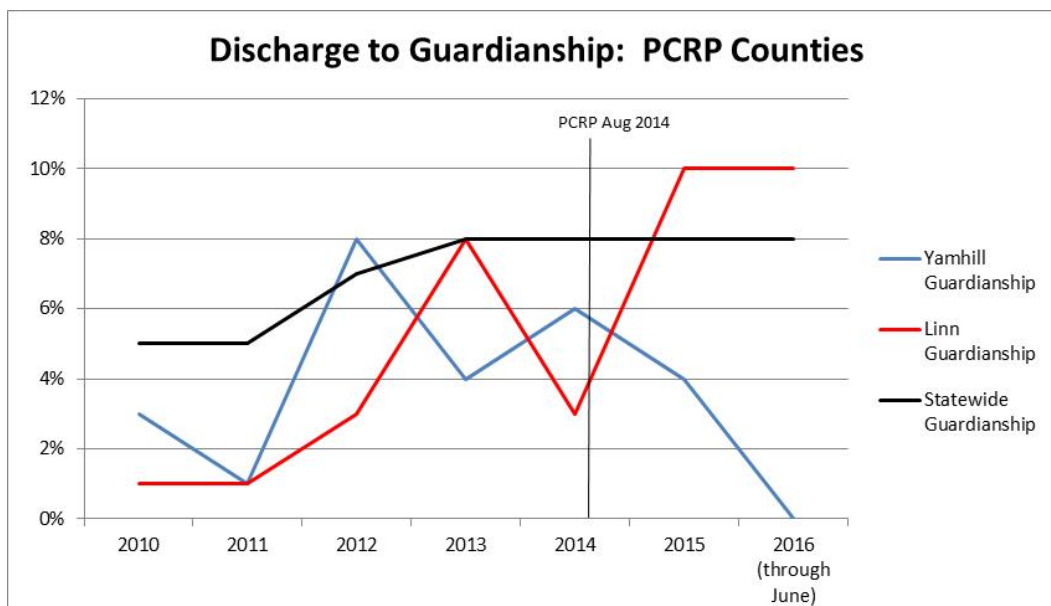
<sup>44</sup> ORS 419B.090(5) (2015).

<sup>45</sup> Turney and Wildeman, *Mental and Physical Health of Children in Foster Care*, *Pediatrics* 138(5) (November 2016).

**Guardianship:** Guardianship is an important measure of permanence which allows children to be discharged from foster care and has the added benefit of maintaining the legal parental relationship between the child and his or her birth parents.<sup>46</sup> It is particularly effective for older children who would have to consent to adoption and have connections with biological family.

The statewide percentage of children who entered a guardianship upon leaving foster care has been increasing steadily since 2010. In 2010, 5% of children entered guardianships, and by June, 2016, the number has increased to 8%.

Use of guardianship in the PCRCP counties appears to be inconsistent and possibly inversely related to the reunification rate. The use of guardianship as a permanent plan is variable because both reunification and adoption should be fully considered before guardianship. Additionally, guardianship is more likely when children are older. In the PCRCP counties in 2015, 25% of children ages 12-14 discharged to guardianship whereas 0% of children age 0-2 discharged to guardianship. In Linn County, the overall guardianship rate for 2015 and through June 2016 is 10%, two points above the statewide average. Conversely, in Yamhill County, the overall rate is 4% and 0%, well below the statewide average.



**Adoption:** Children have a legal right to permanency with a safe family.<sup>47</sup> Adoption is the most permanent alternative for children after reunification. Between 2014 and June 2016, the statewide percentage of children discharged to adoption has declined. From 2014-2015, the statewide rate of decline was 5%. From 2015-June 2016, the statewide adoption rate declined by another 5%.

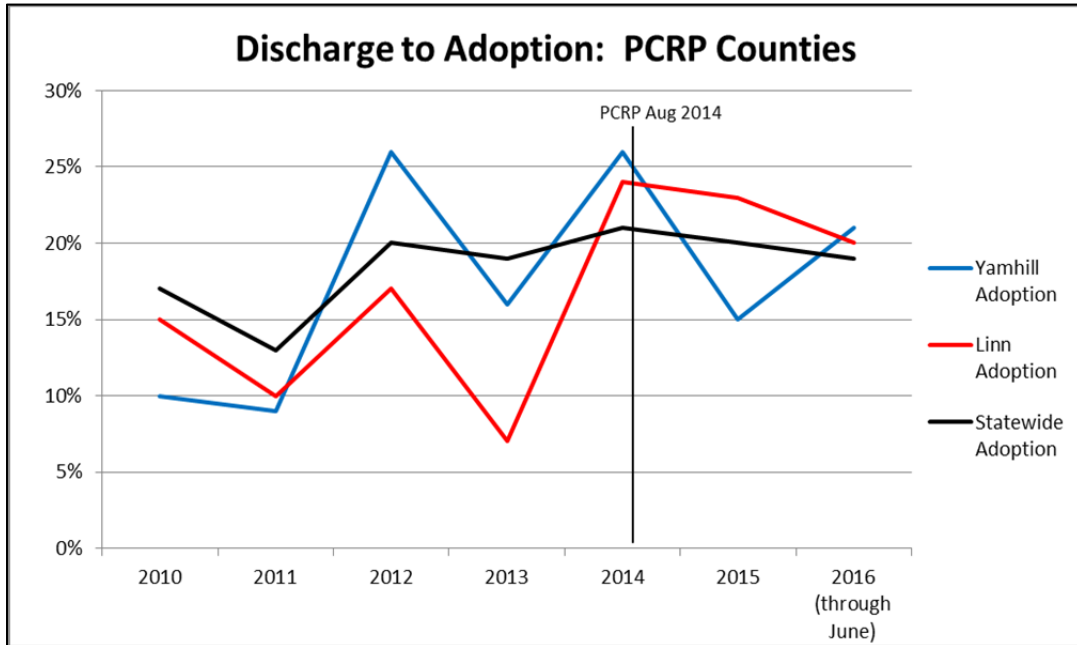
The decline in the number of children adopted is offset by the number of children reunified with families and, to a lesser extent, the number of children discharged to guardianship. As discussed above, within the PCRCP and across the state, the percentage of children reunifying with family continues to increase. In the PCRCP counties, the percentage of children reunifying with families is increasing more rapidly than across the state. It follows that the percentage of children leaving foster care for adoption in the PCRCP counties is also declining.

<sup>46</sup> Guggenheim and Sankaran, *supra* n. 4 at 303.

<sup>47</sup> ORS 419B.090(2) (2015).



In the PCRCP counties, the percentage of children who discharge from foster care to adoption has been decreasing at a rate higher than the statewide average. From 2014-2015, the PCRCP rate of decline was 23%. From 2015-June 2016, the PCRCP rate of decline is 5%.



# PCRP Program Goal: Improved Outcomes for Children and Families

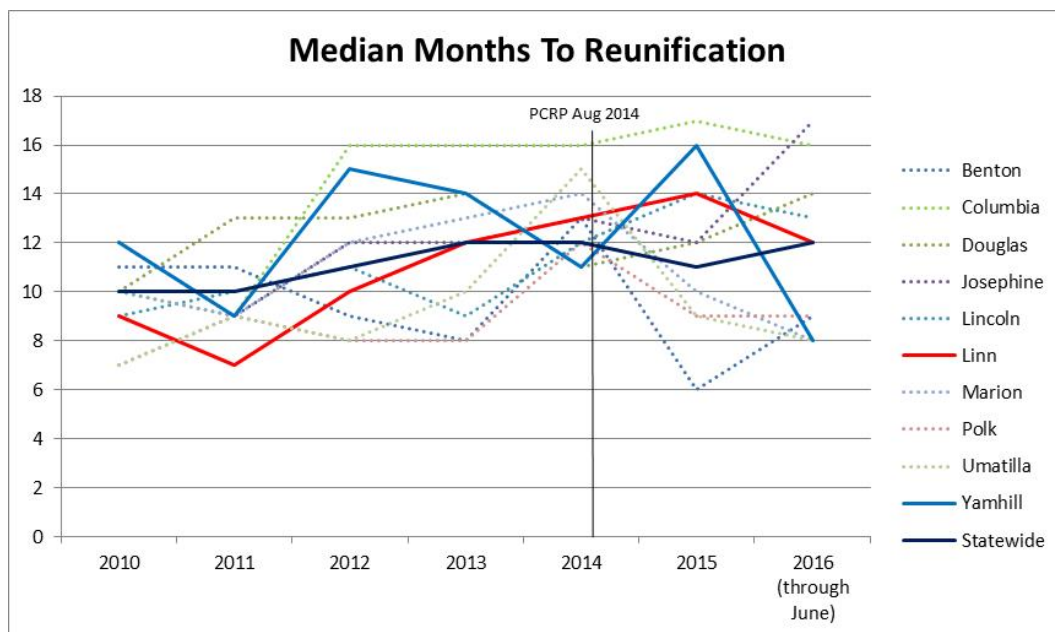
## I. Indicator: Quality representation decreases time to safe permanency

### a. Median time to reunification

*Measure:* Of children discharged, the median number of months to discharge to reunification.<sup>48</sup>

*Explanation:* Reunification occurs when children leave foster care to be reunified with parents or families. An attorney's advocacy for frequent visitation, parent engagement, and the right service plan helps steer the case toward early reunification.<sup>49</sup> It is the preferred permanency plan in the majority of cases. In 2015, 61% children who left foster care were reunited with families.<sup>50</sup>

*Data:* Statewide, from 2015 to June 2016, the median number of months to reunification increased from 11 to 12 months. Over the same time period, Linn County's median time to reunification decreased from 14 to 12 months and Yamhill County's time to reunification decreased from 16 to 8 months. Looking at the trends, statewide time to reunification has been increasing since 2015 while, in the PCRP counties, the time to reunification has decreased over the same time period. Statewide, from 2015 to June 2016, the time to reunification increased by 9% while in the PCRP counties, the average time to reunification decreased by 32%.



<sup>48</sup> Data source: Oregon child welfare data set report OR.05, Of children discharged, the median number of months to discharge (median is middle score where half were more and half less), over time [https://rom.socwel.ku.edu/Oregon\\_Public/AllViews.aspx?R=6005](https://rom.socwel.ku.edu/Oregon_Public/AllViews.aspx?R=6005). Note that this report methodology, updated in 2016 to reflect new federal reporting requirements, is different than the data source used in the 2014-2015 PCRP report. The new methodology results in a longer median length of stay because discharge requires 6 months of reunification time. The prior methodology required 30 days of reunification time.

<sup>49</sup> Cohen and Cortese, *supra* n. 40.

<sup>50</sup> Data source: Oregon Child Welfare Data Set report CM.05 Discharge Reason (of those discharged) [https://rom.socwel.ku.edu/Oregon\\_Public/MyReports.aspx](https://rom.socwel.ku.edu/Oregon_Public/MyReports.aspx).



## b. Median time to adoption

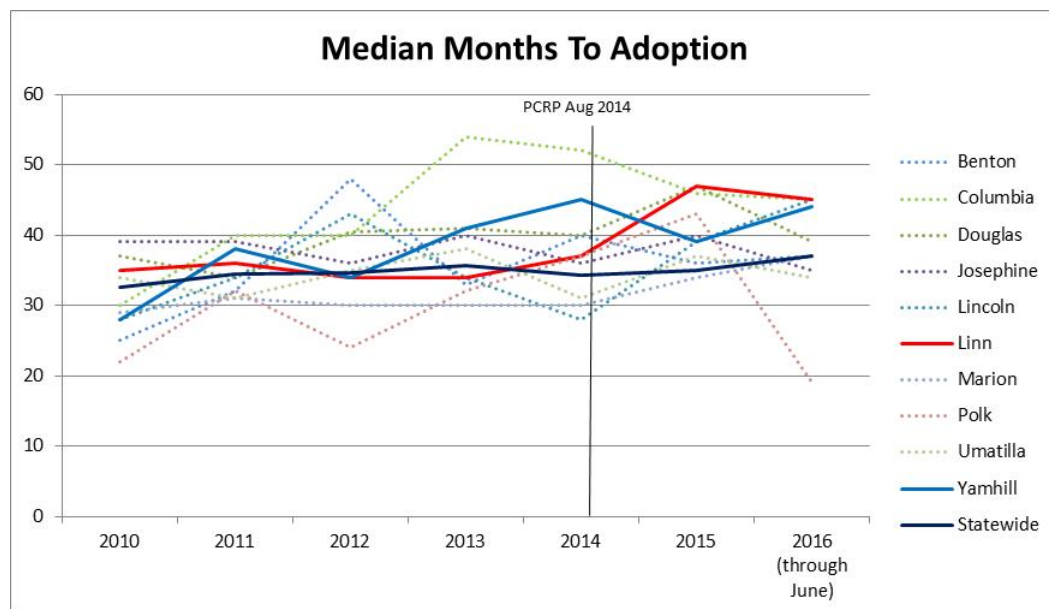
*Measure:* Median months of those adopted within the time period sampled.<sup>51</sup>

*Explanation:* Focused advocacy by attorneys for children and parents is needed to expedite the achievement of permanency for children. Research conducted on Washington State's Parent Representation Program has found that the availability of adequate legal representation speeds reunification with parents, and for those children who do not reunify, it speeds achieving permanency through adoption and guardianship.<sup>52</sup>

*Data:* This indicator is a measure of the time from foster care entry to adoption. This period of time reflects a lengthy legal process which typically includes: the adjudication of a dependency petition, a change of case plan to adoption at a permanency hearing, the filing of a termination of parental rights (TPR) petition, the adjudication of the TPR petition, the selection and designation of an adoptive placement, agency consent to adoption, and the adoption itself. A number of non-legal factors such as special needs of the children and the availability of adoptive resources also influence this measure.

Since 2010, the statewide average is 35 months, with the months to adoption increasing from 34 in 2014, to 35 in 2015, and to 37 during the first half of 2016, a gain of 9% since 2014.

Linn county has seen a 22% increase in the median months to adoption from 37 in 2014 to 45 in 2016. In contrast, over the same period in Yamhill county, the median months to adoption declined by 2% from 45 to 44 months.

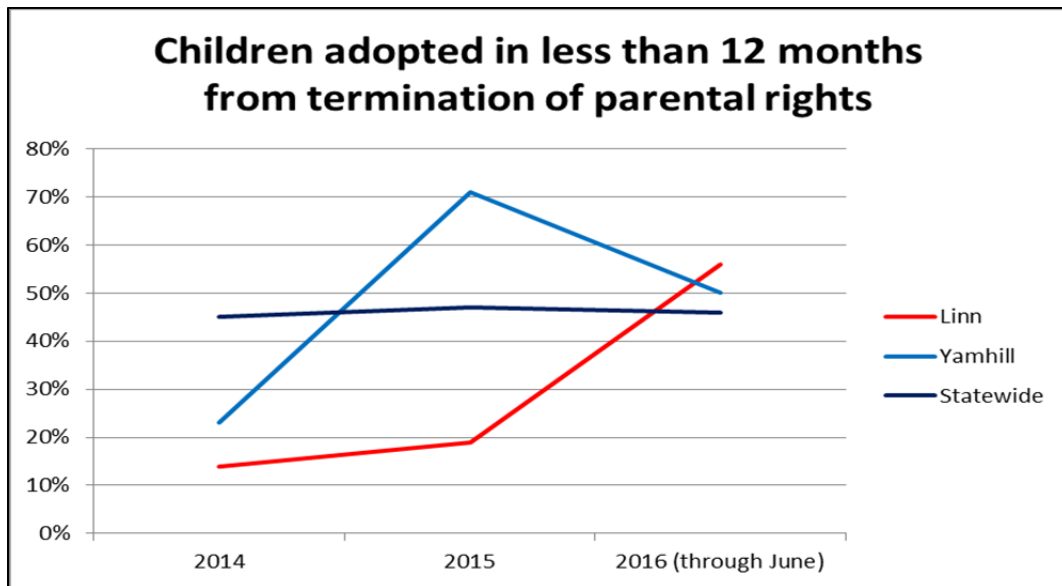


As seen in the chart above, the time from entry to foster care to adoption in both PCR P counties is greater than the statewide average. However, the time to achieve adoption after a child has been freed for adoption (parental rights terminated) has declined significantly in the PCR P counties. When the PCR P began in 2014, on average 81.5% of children awaiting adoption in PCR P counties waited over 12 months. Statewide, 45% of children waited over 12 months. By 2016, in the PCR P

<sup>51</sup> Data source: Oregon child welfare data set report OR.05, Of children discharged from foster care to adoption, the median number of months to discharge (median is middle score where half were more and half less), over time [https://rom.socwel.ku.edu/Oregon\\_Public/AllViews.aspx?R=6005](https://rom.socwel.ku.edu/Oregon_Public/AllViews.aspx?R=6005).

<sup>52</sup> Courtney, Hook & Orme, *supra* n.8.

counties, only 47% waited over 12 months as opposed to 54% statewide.<sup>53</sup> This measure, time to achieve adoption post-TPR more accurately reflects improved advocacy by children’s attorneys within the PCRCP because it is focused on the completion of the adoption process after the identification of an adoptive placement.



### c. Time to achieve permanency

*Measure:* Percentage of children who achieved permanency within 24 months of removal.<sup>54</sup>

*Explanation:* When consistent with the client’s interests, the lawyer should take every appropriate step to expedite proceedings. Delaying a case often increases the time a family is separated and can reduce the likelihood of reunification.<sup>55</sup> Research shows that the effectiveness of foster care diminishes over time. The longer children remain in foster care, the less effective foster care is in meeting children’s needs.<sup>56</sup> Foster care is a significant childhood health risk which leads to poor outcomes for children.<sup>57</sup>

*Data:* From 2010 through 2014, the statewide average hovered at 61%.

Before the start of the PCRCP, both Linn and Yamhill counties had rates lower than the statewide average. In 2015, both had rates consistent with the statewide average and by mid-2016, the percent of children achieving permanency in 24 months in both counties has greatly exceeded the statewide average. In the first half of 2016, 69% of children in Linn County and 74% in Yamhill achieved permanency in 24 months. The statewide average is 64% for the same time frame.

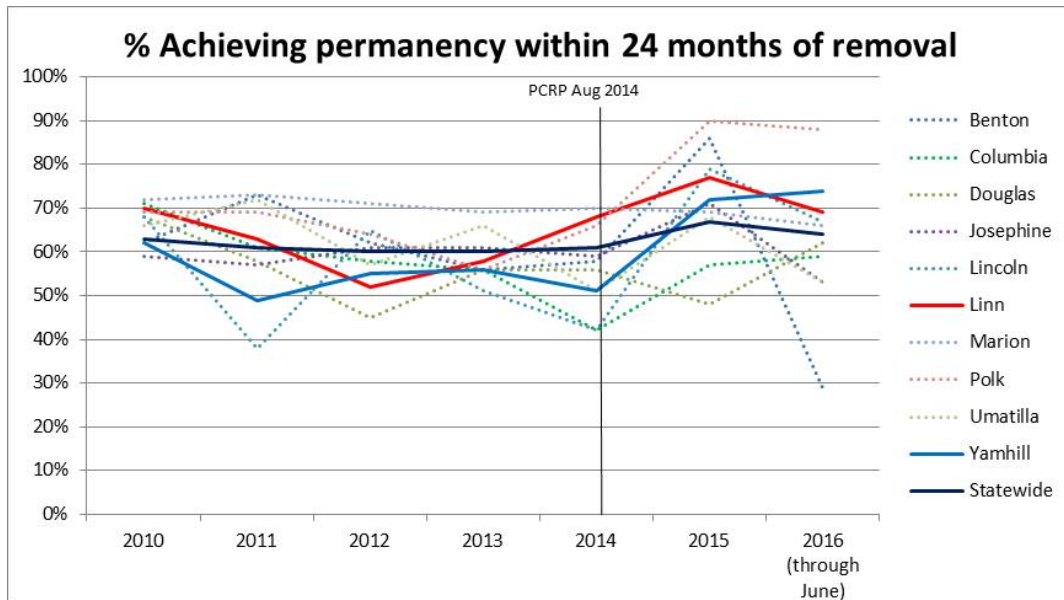
<sup>53</sup> Data source: Oregon child welfare data set report PA.12, Percent of children that became legally free for adoption (TPR) 12 months ago who were discharged to a finalized adoption in less than 12 months of becoming legally free (TPR) [https://rom.socwel.ku.edu/Oregon\\_Public/AllViews.aspx?R=115](https://rom.socwel.ku.edu/Oregon_Public/AllViews.aspx?R=115).

<sup>54</sup> Data source: Oregon child welfare data set report PA.08 Permanency in 24 months (of those entered care 24 months ago) [https://rom.socwel.ku.edu/Oregon\\_Public/AllViews.aspx?R=111](https://rom.socwel.ku.edu/Oregon_Public/AllViews.aspx?R=111).

<sup>55</sup> Oregon State Bar *supra* n. 30. Oregon State Bar *supra* n. 31.

<sup>56</sup> *Joint Interim Task Force on Juvenile Court Dependency Proceeding Final Report* (December 3, 2014) <https://olis.leg.state.or.us/liz/201311/Downloads/CommitteeMeetingDocument/41222> (DRAFT COPY).

<sup>57</sup> Turney and Wildeman, *supra* n.45.

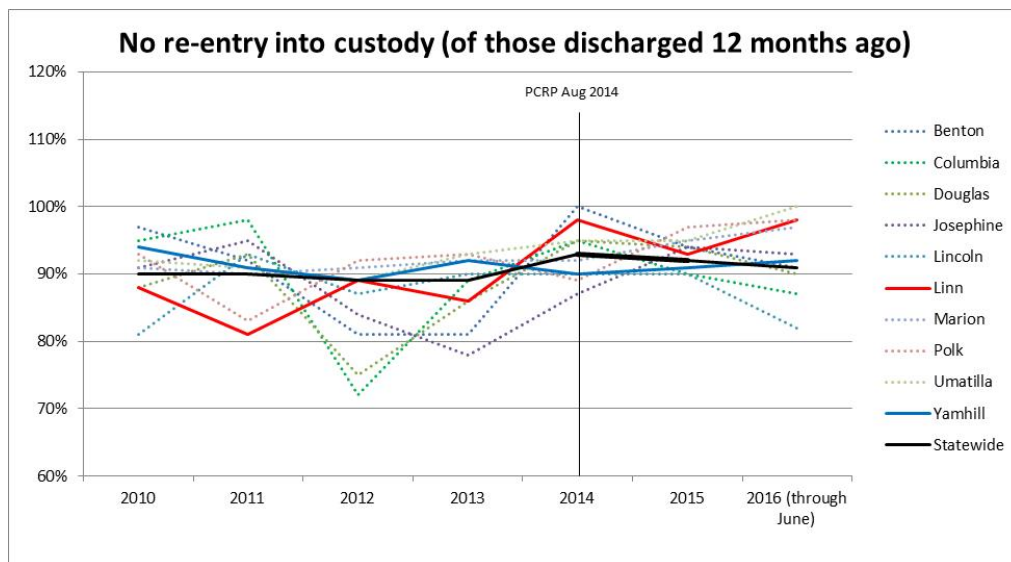


**d. Rate of re-entry after discharge from foster care**

*Measure:* No re-entry into custody of those discharged 12 months ago.<sup>58</sup>

*Explanation:* Safe reunification, as shown by no re-entry into custody within 12 months of discharge from foster care, is a necessary measure when determining whether cases have resolved appropriately, whether parents have remediated the issues which led to foster care placement, and whether services provided to families were appropriate and effective. Since the inception of the PCR, the percentage of cases resulting in reunification has steadily increased to well above the statewide average. But, it is critical to analyze reunification data in light of child safety.

*Data:* In 2014, the statewide percentage of children who were safely reunified (or placed into guardianship or adoption) upon discharge from foster care was 93%. Safe reunifications have decreased statewide to 91% in mid-2016. In 2015, Linn and Yamhill counties had reunifications slightly below the statewide average of 92%. By June 2016, both counties maintained safe reunification rates above the statewide average.



<sup>58</sup> Data source: Oregon child welfare data set report CM.06 No Re-entry into Custody-of those discharged 12 mos ago [https://rom.socwel.ku.edu/Oregon\\_Public/MyReports.aspx](https://rom.socwel.ku.edu/Oregon_Public/MyReports.aspx).

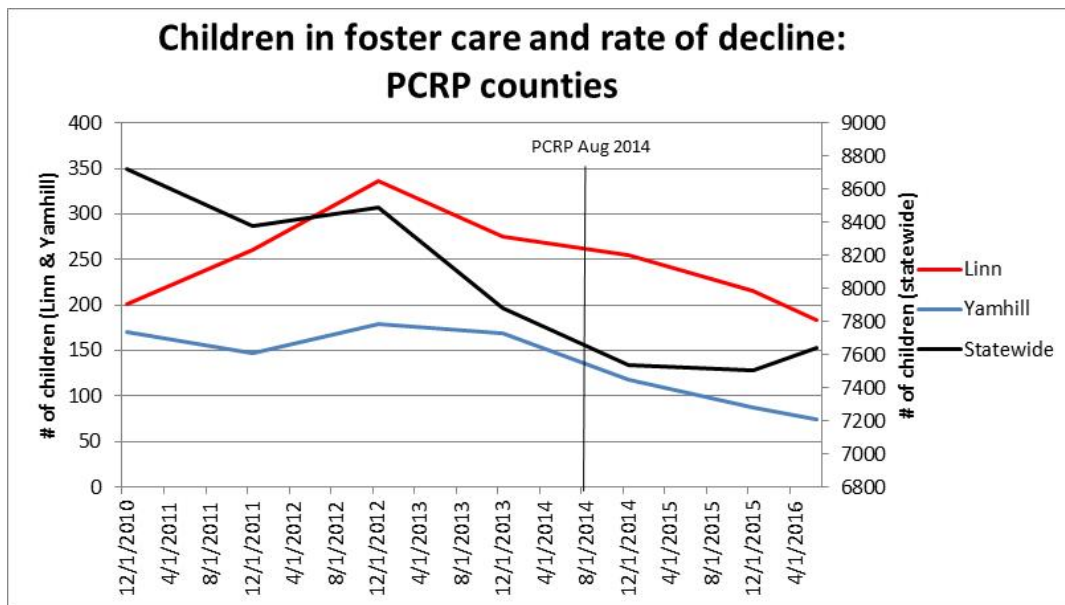
**e. Number of children in foster care**

*Measure:* Count of children in foster care by placement type.<sup>59</sup>

*Explanation:* According to Partners for Our Children, a Washington State research and policy organization, jurisdictions that want to improve legal representation and potentially shorten the time children are in foster care should consider a program focused on improved legal representation similar to the Parent Child Representation Program.<sup>60</sup> Reducing the use of foster care is a goal of the Parent Child Representation Program.

*Data:* From 2010-2014, the number of children in care in Oregon had been steadily declining. In 2015, the number of children in care plateaued, and, in 2016, the number of children in care is on the rise. On December 31, 2015 there were 7503 children in Oregon’s foster care system. By June 30, 2016, an additional 135 children were in the foster care system, an increase of 2% (total of 7638).

In Linn and Yamhill counties, the number of children in care has been declining since the end of 2012. On December 31, 2012, there were 336 children in foster care in Linn County and 179 in Yamhill County. By December 31, 2015, there were 214 children in foster care in Linn County and 87 in Yamhill. Although the number of foster children had been declining even prior to the start of the Parent Child Representation Program, the *rate* of reduction has increased since the PCRCP began and, the rate of reduction has outpaced the statewide rate. The average rate of reduction in children in foster care for PCRCP counties was 19% in 2014, 21% in 2015, and 15% through June 2016. In contrast, the number of children in foster care statewide decreased by 4% in 2014, 0% in 2015 and *increased* by 2% between January 2016 and June 2016. The graph below reflects the number of foster children in Linn and Yamhill counties over the past 5 years as compared to Oregon as a whole.



<sup>59</sup> Data source: Oregon child welfare data set report CM.02 Count of Children in Foster Care by Placement Type-Last Day of Period [https://rom.socwel.ku.edu/Oregon\\_Public/MyReports.aspx](https://rom.socwel.ku.edu/Oregon_Public/MyReports.aspx).

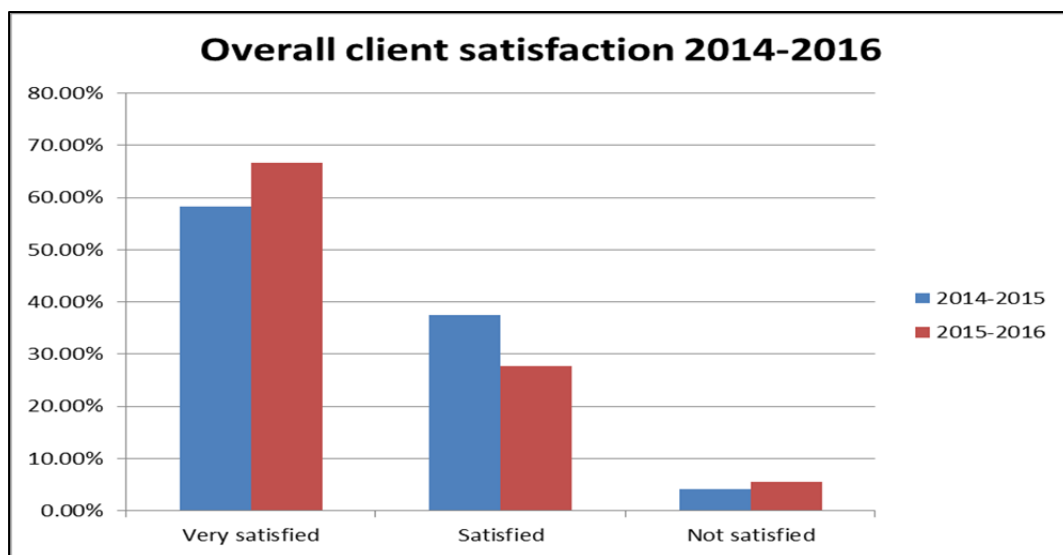
<sup>60</sup> Courtney, Hook & Orme, *supra* n 8.

## II. Indicator: Client satisfaction

*Measure:* Percentage of former PCRCP clients who report overall satisfaction with the representation provided by their attorney.<sup>61</sup>

*Explanation:* Client satisfaction, trust and participation are important elements of any successful legal representation. Without these elements, there is a high probability that the client will not fully cooperate with or confide in their attorney and could jeopardize the effectiveness of the client's defense.<sup>62</sup> Client satisfaction is an important component in assessing attorney competence and effectiveness. Within the PCRCP, an attempt is made to contact each former client who consents to the survey.

*Data:* Former clients are asked questions related to attorney responsiveness, thoroughness, communication, and investigation. Client satisfaction surveys began in April 2015 and, as of June 2016, 42 former clients have completed the survey with the majority reporting being very satisfied with the quality of representation.



<sup>61</sup> Data source: PCRCP client satisfaction survey.

<sup>62</sup> Washington State University, *Hamilton County Customer Satisfaction Pilot Project* (May 31, 2010)

[http://www.americanbar.org/content/dam/aba/events/legal\\_aid\\_indigent\\_defendants/2014/lisclaid\\_3d\\_%20janet\\_moore\\_indig\\_def\\_ref\\_proj.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/lisclaid_3d_%20janet_moore_indig_def_ref_proj.authcheckdam.pdf).

## Conclusion

This report serves as a strong endorsement of the Parent Child Representation Program as a model for legal representation of parents and children in juvenile dependency cases. Over the past two years, the Office of Public Defense Services relied on a number of qualitative and quantitative data indicators to measure the effectiveness of improved legal representation within the PCRCP counties. The data gathered by OPDS and presented in this report reflects the reduced use of foster care, increased reunification with family, and expedited permanency for children.

Improving legal representation requires time, consistent focus, and effective use of resources. Those who work diligently to represent parents and children in the PCRCP counties—attorneys, legal assistants, and case managers—should be recognized for their commitment to providing high-quality, client-centered legal representation. Additionally, the collaborative efforts of local stakeholders—Judges, Deputy District Attorneys, Assistant Attorney Generals, CASAs, Juvenile Court Counselors, and DHS staff—have been indispensable. Last, feedback and encouragement from former clients, both parents and children, has provided helpful guidance.

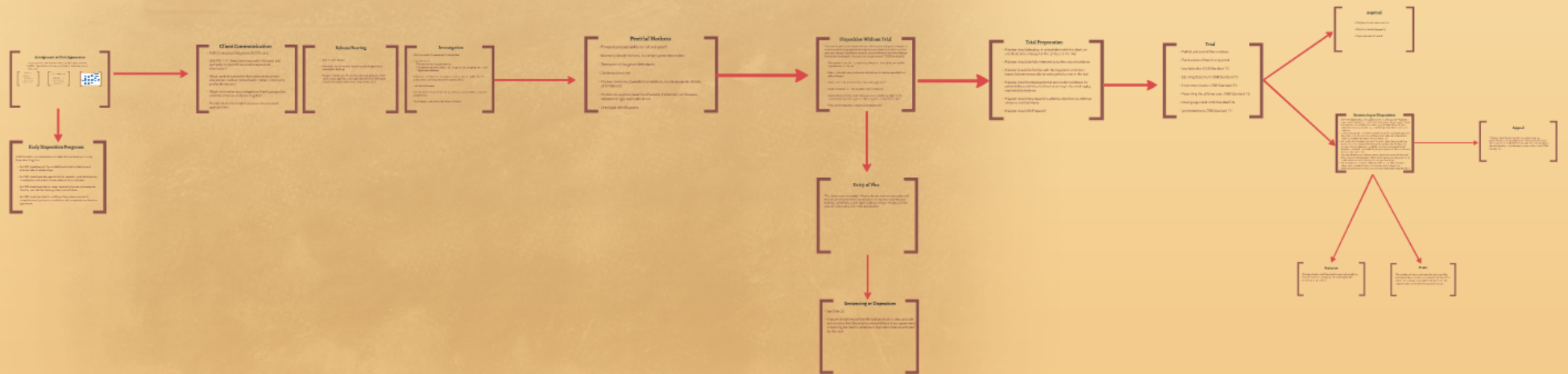
In 2016, statewide implementation of the Parent Child Representation Program was endorsed by the Governor’s Task Force on Dependency Representation because the program is linked to improved outcomes and offers an opportunity for cost-effective, quality legal representation for parents and children.<sup>63</sup> The Office of Public Defense Services is committed to continuing to improve the PCRCP in existing counties and enabling lawyers to serve more families as the program grows.

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<sup>63</sup> *Oregon Task Force on Dependency Representation Final Report*, *supra* n. 1 at 3.  
PCRCP Annual Report 2015-2016 - Page 22



# Client Representation in Criminal and Delinquency Cases



# Arraignment or First Appearance

In many counties, the first event in a case takes place at court facilities separate from the main courthouse, sometimes many miles away.

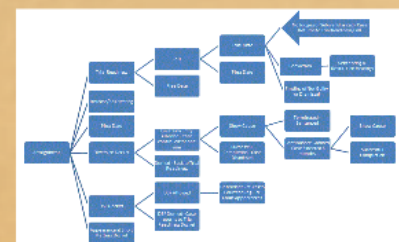
## The Attorney

- PDSC Qualification Standards
- Performance Standards
  - Oregon State Bar
  - American Bar Association
  - National Juvenile Defender Center
- Oregon Rules of Professional Conduct
  - Obligations Regarding Workload
  - Formal Ethics Opinion 2007-178
- Continuing Education Requirements

## Obligations at First Appearance

- Lawyer must be present
- Contact client and obtain case information prior to court where possible
- Inform client of allegations
- Assert pertinent rights on the records
- Attempt to secure release where appropriate
- Address emergency circumstances
- Obtain and provide contact information

## The Real World





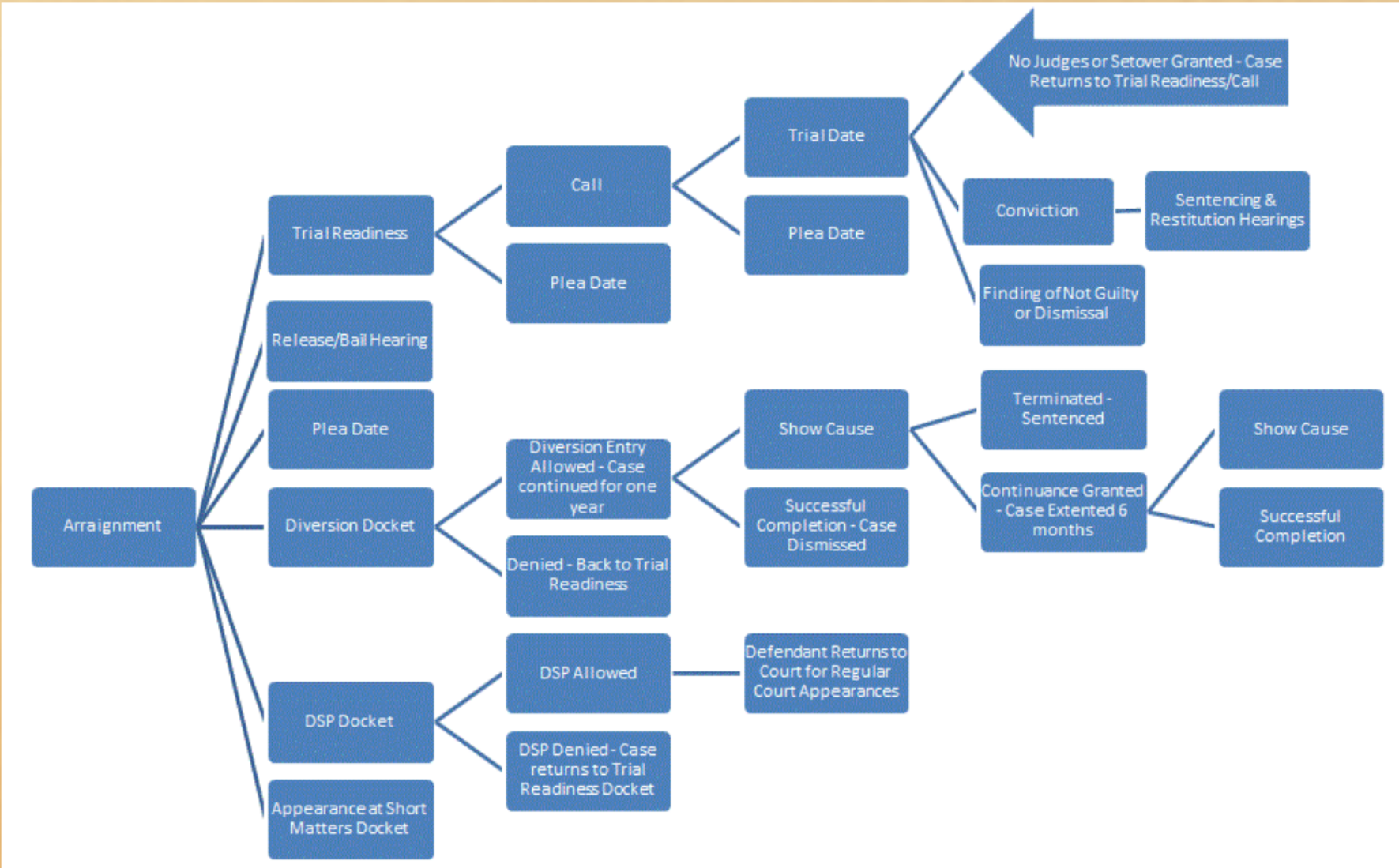
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- Address emergency circumstances
- Obtain and provide contact information

# The Real World



# Early Disposition Programs

*PDSC Guidelines for Participation of Public Defense Attorneys in Early Disposition Programs:*

- An EDP should permit the establishment and maintenance of attorney/client relationships
- An EDP should provide opportunity for necessary pretrial discovery, investigation and review of case-relevant circumstances
- An EDP should provide for adequate physical space and adequate time for confidential attorney/client consultations
- An EDP should provide for additional time where needed to complete investigations or conclude a civil compromise or diversion agreement



# Client Communication

- PDSC Contractual Obligations (24/72 hours)
- OSB RPC 1.4 ("...keep client reasonably informed...and promptly comply with reasonable requests for information.")
- Obtain pertinent personal information (employment, educational, medical, mental health, military, community and family ties, etc.)
- Obtain information about allegations (client's perspective, potential witnesses, evidence to gather)
- Provide information (explain process, role of counsel, applicable law)

# Release Hearing

- Duty to seek release
- If denied, should continue to seek release at appropriate subsequent hearings
- Requires familiarity with security release procedures, third-party release agencies, and exploration of other third-party options (in-patient treatment, group homes, etc.)

# Investigation

- Duty to conduct independent investigation
- Legal Research
  - Element of the charged offense
  - Constitutional and statutory challenges to the charging instrument
  - Applicable defenses
- Collateral consequences (immigration, employment, public benefits, professional licensing, education opportunities)
- Interview witnesses
- Consult with forensic experts (drugs, firearms, arson, DNA, computers, accountants)
- Psychological and other evaluations of client

# Pretrial Motions

- Fitness to proceed (ability to "aid and assist")
- Discovery (*Brady* motions, to compel, protective orders)
- Severance of charges or defendants
- Continuance of trial
- Motions to dismiss (speedy trial violations, double jeopardy, statute of limitations)
- Motions to suppress (search and seizure, involuntary confessions, violation of right to remain silent)
- Unreliable identifications



# Disposition Without Trial

"A lawyer should not recommend that a client enter a dispositional plea or admission unless appropriate investigation and evaluation of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced if the case were to go forward." OSB Standard 6.1

- Plea agreements, civil compromise, diversion, Formal Accountability Agreements, dismissal
- Explain strength and weaknesses of defense, impact on possibility of other charges
- Keep client fully informed of continued negotiations
- Seek mediation or judicial settlement conference
- Advise client of likely sentencing outcomes, including eligibility for community-based programs, DOC programs, likely release dates
- Fully advise regarding "collateral consequences"

# Entry of Plea

"The lawyer must not unduly influence the decision to enter a plea and must ensure that the client's acceptance of the plea is voluntary and knowing, and reflects an intelligent understanding of the plea and the rights the client will forfeit." OSB Standard 6.2

# Sentencing or Disposition

- See Slide 23
- A lawyer should ensure that the judicial record is clear, accurate and contains the full contents and conditions of any agreements concerning the client's sentence or disposition that are adopted by the court

# Trial Preparation

- A lawyer should develop, in consultation with the client, an overall defense strategy for the conduct of the trial
- A lawyer should be fully informed as to the rules of evidence
- A lawyer should be familiar with the legal and evidentiary issues that can reasonably be anticipated to arise in the trial
- A lawyer should analyze potential prosecution evidence for admissibility problems and develop strategies for challenging inadmissible evidence
- A lawyer should be prepared to address objections to defense evidence and testimony
- A lawyer should Be Prepared!

# Trial

- Pretrial oral and written motions
- The decision of bench or jury trial
- Jury Selection, OSB Standard 7.2
- Opening Statement, OSB Standard 7.3
- Cross-examination, OSB Standard 7.4
- Presenting the defense case, OSB Standard 7.5
- Closing argument, OSB Standard 7.6
- Jury instructions, OSB Standard 7.7

# Acquittal

- May be of all or some counts
- Return of seized property
- Expungement of arrest



# Sentencing or Disposition

- Be knowledgeable about the applicable law, including concerning length of sentences, imposition of concurrent and consecutive sentences, merger of convictions, repeat offender sentencing, proportionality challenges, prohibitions on ex post facto laws, and the imposition of fines, fees, and restitution
- Understand availability of deferred sentences, conditional discharge, early termination of probation, informal dispositions, alternative dispositions including conditional postponement and diversion
- Be familiar with law governing credit for pretrial detention, earned time credit, time limits on post-trial and post-disposition juvenile detention and out-of-home placement, eligibility for correctional programs and furloughs, and eligibility for and length of post-prison supervision or parole from juvenile dispositions
- Be prepared to present evidence concerning client's relevant history and circumstances, including prior military circumstances, physical and mental health needs, and educational needs, among other things
- Prepare to present available mitigating evidence and other favorable information, and object to inaccurate or immaterial information
- Review judgments and move to correct errors that disadvantage the client





# Probation

A lawyer should assist the client in seeking to clarify or correct erroneous, inappropriate and inapplicable conditions of probation





# Prison

The number of clients sentenced to prison and the duration of those sentences is a direct function of the ability of the lawyer to provide each client with the representation outlined in the preceding slides

# Appeal

"A lawyer should be familiar with the requirements for preserving issues for appellate review. A lawyer should discuss the various forms of appellate review with the client and apprise the client of which issues have been preserved for review." OSB Standard 9.2

Oregon State Bar

# Report of the Task Force on Standards of Representation in Criminal and Juvenile Delinquency Cases

**April 25, 2014**

# Foreword

The original version of the Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases (hereafter, the performance standards) was approved by the Board of Governors on September 25, 1996. Significant changes to the original performance standards were adopted in 2006, and a new set of standards pertaining to representation in post-conviction standards were adopted in 2009.

As noted in the earlier revision, in order for the performance standards to continue to serve as valuable tools for practitioners and the public, they must be current and accurate in their reference to federal and state laws and they must incorporate evolving best practices.

The Foreword to the original performance standards noted that “[t]he object of these [g]uidelines is to alert the attorney to possible courses of action that may be necessary, advisable, or appropriate, and thereby to assist the attorney in deciding upon the particular actions that must be taken in a case to ensure that the client receives the best representation possible.” This continues to be the case, as does the following, which was noted in both the Foreword in the 2006 revision and the Foreword to the 2009 post-conviction standards:

“These guidelines, as such, are not rules or requirements of practice and are not intended, nor should they be used, to establish a legal standard of care. Some of the guidelines incorporate existing standards, such as the Oregon Rules of Professional Conduct, however which are mandatory. Questions as to whether a particular decision or course of action meets a legal standard of care must be answered in light of all the circumstances presented.”

We hope that the revised Performance Standards, like the originals, will serve as a valuable tool both to the new lawyer or the lawyer who does not have significant experience in criminal and juvenile cases, and to the experienced lawyer who may look to them in each new case as a reminder of the components of competent, diligent, high quality legal representation.



Tom Kranovich  
Oregon State Bar President

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# **Report of the Task Force on Standards of Representation in Criminal and Juvenile Delinquency Cases**

## **Summary and Background**

In September of 1996, the Oregon State Bar Board of Governors approved the Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases. In May of 2006, the Board accepted revisions to the 1996 standards. In 2012, at the direction of the OSB Board of Governors, the two separate task forces began meeting to work on significant revisions to the standards in criminal delinquency and dependency cases. One group focused on juvenile dependency standards, and the other on adult criminal and juvenile delinquency standards.

On the following pages the criminal task force has provided updated standards which are recommended to replace what is currently published on the OSB website as the specific standard “Specific Standards for Representation in Criminal and Juvenile Delinquency Cases.” These changes, when combined with the proposed revisions to the third specific standard (juvenile dependency – expected to be completed soon), will make the “general standards” in Section 1 unnecessary.

The task force included representative from academia, the bench and from both private practice and public defender offices. Task force members were Margie Paris, Professor of Law, University of Oregon; Shaun McCrea, in private practice in Eugene; The Honorable Lisa Grief, Jackson County Circuit Court; Lane Borg, Executive Director, Metropolitan Public Defender; Julie McFarlane, Supervising Attorney, Youth, Rights & Justice; Shawn Wiley, Chief Deputy Defender, Appellate Division, Office of Public Defense Services. Paul Levy, General Counsel, Office of Public Defense Services, served as chair of the task force.

The task force began its work by conducting a detailed examination of the existing standards and a review of other states' standards and the standards of national organizations. The task force found that although Oregon's standards, like those of most other states, are firmly grounded in the standards first promulgated by the National Legal Aid and Defender Association (NLADA) in 1994, the structure and substance of Oregon's standards had significant modifications.

The task force determined that the variations from the NLADA standards were both good and bad. On the positive side, through an earlier revision of the Bar standards in 2005, they reflected a growing recognition that the role of a juvenile defender is highly specialized and complex, requiring knowledge and skills unique to delinquency cases in addition to those required in adult criminal cases. The standards also placed emphasis on the collateral consequences of criminal convictions, presaging the U.S. Supreme Court's seminal decision on that subject.<sup>1</sup> Indeed, overall, the existing Oregon standards serve as strong and valid guideposts to effective criminal and juvenile defense.

But the task force also found that the structure of the standards was confusing and unhelpful. Why, for instance, should Oregon recognize five "general standards," only to repeat them again in another set of "specific standards"? And is it really necessary to set out in the standards specific provisions of the Oregon Rules of Professional Conduct when those obligations already exist for all attorneys in the state? More fundamentally, since the last revision in 2005, the defense of both criminal and delinquency cases has become increasingly complex and challenging. Advances in neuroscience, for instance, have challenged traditional notions of accountability in both delinquency and adult criminal cases. Adult criminal defense has changed dramatically with the evolution of constitutional doctrine applying the right to jury trial to some sentencing proceedings.

The ubiquity of computers and smartphones has also dramatically changed the type of evidence lawyers are likely to encounter, as well as how lawyers are likely to do their own work.

The task force decided that the original organization of NLADA's standards provided the best structure for our own standards, while preserving much of the good work that had already been done to update the Oregon standards prior to our revision. Thus, within a new structure, the task force maintained a format of a short statement of a standard followed by more detailed implementation language. New for this revision, and in keeping with the NLADA and many other state standards, is commentary following many of the standards, which provides

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<sup>1</sup> *Padilla v. Kentucky*, 559 U.S. 356 (2010).

additional background and guidance regarding a particular aspect of criminal or delinquency defense.

The task force also had the benefit of recently published National Juvenile Defense Standards (2012), a work of the highly regarded National Juvenile Defender Center, which present a systematic approach to defense practice in juvenile court. While the new revision specifically recognizes this work as establishing a national norm for representation in delinquency cases, it also incorporates specific elements of this work into relevant Oregon standards.

The task force also brought its own considerable expertise and perspective to the review of existing standards and the drafting of revisions, consulting as required with other practitioners with recognized expertise in certain areas of practice. Building on an existing set of very good standards, the revision, if approved by the BOG, will serve as a useful tool for both the lawyer new to criminal and delinquency defense and the experienced lawyer who seeks guidance on the best practices for diligent and high quality representation. As such, the revision should be a useful tool for lawyers and law firms providing training for new lawyers. And they should serve as a helpful guide for courts, clients, the media and others in the interested public who wish to understand the expectations for defense lawyers in criminal and delinquency cases.



## Introduction to the Revised Standards

Since 2005, when these performance standards were last revised, the defense of criminal and delinquency cases has become increasingly complex and challenging. Advances in neuroscience, for instance, have challenged traditional notions of the legal status of juveniles under the United States Constitution, as reflected in cases limiting the authority of states to impose the most severe penalties on juvenile offenders<sup>2</sup> and requiring consideration of a youth's age in determining whether *Miranda* warnings should be given.<sup>3</sup> Likewise, adult criminal defense has changed dramatically with the evolution of constitutional doctrine applying the right to jury trial to sentencing proceedings<sup>4</sup> and expanding the obligations of lawyers to advise clients concerning the collateral consequences of guilty pleas.<sup>5</sup> The performance standards that follow reflect new best practices that have developed in response to these and other developments in the law, science and professional responsibilities of lawyers.

As in earlier versions of these standards, most of the guidance that follows applies in both adult criminal and juvenile delinquency cases. However, this revision reflects a growing recognition, already evident in the 2005 revision, that the role of a juvenile defender is highly specialized and complex, requiring knowledge and skills unique to the duties of counsel in delinquency cases in addition to those required to perform most of the functions of counsel in an adult criminal case. In addition, since the last revision, the National Juvenile Defender Center has published the *National Juvenile Defense Standards (2012)*, which present a systematic approach to defense practice in juvenile court and establish a national norm for this work. These new standards have informed the standards presented here but should also be consulted directly for detailed guidance on the obligations of counsel in delinquency cases.

The standards that follow do not address the special obligations of counsel in capital cases. While lawyers representing clients facing the death penalty will ordinarily be expected to meet the standards that follow here, additional duties of counsel in capital cases are presented and explained in detail in the *American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003)*. Lawyers in death penalty cases should continue to consult the ABA standards as well as the standards in this revision.

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<sup>2</sup> *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

<sup>3</sup> *J.D.B. v. North Carolina*, 131 S. Ct. 502 (2011).

<sup>4</sup> *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004).

<sup>5</sup> *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010).

As noted in earlier versions of these standards, the guidance here will serve as a valuable tool for both the lawyer new to criminal or delinquency cases but also the experienced lawyer who seeks guidance on the best practices for diligent and high quality legal representation. But these standards should serve others as well. While they are not intended, nor should they be used, to establish a mandatory course of action in every case, they do reflect the current best practices for representation in criminal and delinquency cases. As such, they are a useful tool for lawyers and organizations providing training for new lawyers. They should also serve as a helpful guide for courts, clients, the media and others in the interested public who wish to understand the expectations for defense lawyers in criminal and delinquency cases.

# Specific Standards for Representation in Criminal and Juvenile Delinquency Cases

## **STANDARD 1.1 – ROLE OF DEFENSE COUNSEL**

**The lawyer for a defendant in a criminal case and for a youth in a delinquency case should provide quality and zealous representation at all stages of the case, advocating at all times for the client’s expressed interests. The lawyer shall abide by the Oregon Rules of Professional Conduct and applicable rules of court.**

### Implementation:

1. In abiding by the Oregon Rules of Professional Conduct, a lawyer should ensure that each client receives competent, conflict-free representation in which the lawyer keeps the client informed about the representation and promptly responds to reasonable requests for information.
2. The defense of a delinquency case requires knowledge and skills specific to juvenile defense in addition to what is required for the defense of an adult criminal case. Lawyers representing clients in juvenile court should be familiar with and follow the National Juvenile Defender Center’s *National Juvenile Defense Standards (2012)*.
3. In both criminal and juvenile delinquency cases, a lawyer is bound by the client’s definition of his or her interests and should not substitute the lawyer’s judgment for that of the client regarding the objectives of the representation. In delinquency cases, a lawyer should explain to the client and, where appropriate, to the client’s parents that the lawyer may not substitute either his or her own view of the client’s best interests or a parent’s interests or view of the client’s best interests for those expressed by the client.
4. A lawyer should provide candid advice to the client regarding the probable success and consequences of pursuing a particular position in the case and give the client the information necessary to make informed decisions. A lawyer should consult with the client regarding the assertion or waiver of any right or position of the client.

5. A lawyer should consult with the client on the strategy and means by which the client's objectives are to be pursued and exercise the lawyer's professional judgment concerning technical and tactical decisions involved in the representation.

Commentary:

The paramount obligation of a lawyer is to advocate for a client's cause with zeal, skill and devotion. It is wrong to assert that the vague notion that a lawyer's role as an "officer of the court" should temper a lawyer's commitment to a client's cause. "The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the [client's] counselor and advocate with courage and devotion and to render effective, quality representation."<sup>6</sup> Indeed, a former Oregon State Bar General Counsel and Executive Director has argued convincingly that "the notion that [lawyers] have ethical duties to courts and judges as 'officers of the court' is erroneous and confusing."<sup>7</sup>

Especially in criminal and delinquency cases, where lawyers often represent troubled clients accused of conduct that may be widely condemned, the overarching duty of counsel is a "vigorous advocacy of the client's cause," guided by "a duty of loyalty" and the employment of the skill and knowledge necessary for a reliable adversarial system of justice.<sup>8</sup> As a matter of professional responsibility, "[a] lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."<sup>9</sup>

The same obligations of counsel in criminal cases apply with equal force in representing youth in juvenile delinquency proceedings. "At each stage of the case, juvenile defense counsel acts as the client's voice in the proceedings, advocating for the client's expressed interests, not the client's 'best interest' as determined by counsel, the client's parents or guardian, the probation officer, the prosecutor, or the judge."<sup>10</sup> Likewise, "[t]here is no exception to attorney-client confidentiality in juvenile cases for parents or guardians," nor in service of what counsel

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<sup>6</sup> *ABA Standards for Criminal Justice, Standard 4.1.2 The Function of Defense Counsel* (3d ed. 1993).

<sup>7</sup> *Officers of the Court: What does it mean?* George Riemer, Bar Counsel Column, Oregon State Bar Bulletin, August 2001.

<sup>8</sup> *Strickland v. Washington*, 446 U.S. 668, 104 S. Ct. 2052 (1984).

<sup>9</sup> *ABA Model Rules of Professional Conduct, Commentary to Rule 1.3*, ABA Center for Professional Responsibility (2007).

<sup>10</sup> *The Role of Juvenile Defense Counsel in Delinquency Court*, p. 7, National Juvenile Defender Center (2009).

or others consider the client’s “best interest.”<sup>11</sup> Nor does a juvenile’s minority status “automatically constitute diminished capacity such that a juvenile defense attorney can decline to represent the client’s expressed interests.”<sup>12</sup>

In both delinquency and criminal cases, “[c]ertain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel.”<sup>13</sup> In both circumstances, however, decisions by either the client or lawyer should be made after full consultation. The ABA standards identify decisions for the client as what pleas to enter, whether to accept a plea agreement, whether to waive jury trial, whether to testify in his or her own behalf and whether to appeal. The ABA standards likewise identify strategic and tactical decisions made by the lawyer to include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions to make, and what evidence should be introduced.

As noted, that allocation of decisional authority applies with equal force in delinquency cases.<sup>14</sup> However, in delinquency cases, a lawyer may need to emphasize that the client is “in charge” of the critical decisions in the case. “In clear, concise, and developmentally appropriate terms, counsel must exercise special care at the outset of representing a client to clarify the scope and boundaries of the attorney-client relationship.”<sup>15</sup>

Although Standard 1.1 calls for a strong client-centered model of advocacy, “[d]efense counsel is the professional representative of the accused, not the accused’s alter ego.”<sup>16</sup> Thus, defense counsel “has no duty to execute any directive of the accused which does not comport with law” or with the lawyer’s obligations under standards of professional conduct. *Id.* Moreover, in those areas of strategic and tactical decision making that are committed to the informed judgment of counsel after consultation with the client, there is no obligation on counsel “to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to press those points.”<sup>17</sup> Indeed, it would be an abdication of counsel’s professional responsibilities to acquiesce to a client’s ill-advised directions in these matters for the sake of expediency or to mollify a difficult client.

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<sup>11</sup> *Id.* p. 12.

<sup>12</sup> *Id.* p. 10.

<sup>13</sup> *ABA Standards for Criminal Justice, The Defense Function, Standard 4-5.2, Control and Direction of the Case* (3d ed. 1993).

<sup>14</sup> See, *National Juvenile Defense Standards, Standard 2.2, Explain the Attorney-Client Relationship*, National Juvenile Defender Center (2012).

<sup>15</sup> *Id.*

<sup>16</sup> *ABA Standards for Criminal Justice, Standard 4.1.2 The Function of Defense Counsel* (3d ed. 1993).

<sup>17</sup> *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308 (1983).

Previous versions of these standards often repeated verbatim are applicable provisions of the Oregon Rules of Professional Conduct and predecessor rules of professional responsibility. The absence of specific reference to the Rules of Professional Conduct in the current version of these standards should not be taken as reflecting a position that they apply with any less force to defense counsel.

## **STANDARD 1.2 – EDUCATION, TRAINING AND EXPERIENCE OF DEFENSE COUNSEL**

- A. To provide quality representation, a lawyer must be familiar with the applicable substantive and procedural law, and its application in the particular jurisdiction where counsel provides representation. A lawyer has a continuing obligation to stay current with changes and developments in the law and with changing best practices for providing quality representation in criminal and delinquency cases. Where appropriate, a lawyer should also be informed of the practices of the specific judge before whom a case is pending.**
  
- B. Prior to handling a criminal or delinquency matter, a lawyer should have sufficient experience or training to provide quality representation.**

### **Implementation:**

1. In order to remain proficient in the law, court rules and practice applicable to criminal and delinquency cases, a lawyer should regularly monitor the work of Oregon and pertinent Federal appellate courts and the Oregon State Legislature.
  
2. To stay current with developments in the law and practice of criminal and delinquency cases, a lawyer should maintain membership in state and national organizations that focus on education and training in the practice of criminal and delinquency cases and subscribe to listservs, consult available online resources, and attend continuing legal education programs devoted to the practice of criminal and delinquency cases.
  
3. A lawyer practicing criminal or juvenile delinquency law should complete at least 10 hours of continuing legal education training in criminal and delinquency law each year.
  
4. A lawyer practicing in criminal or juvenile delinquency law should become familiar with the basics of immigration law pertinent to the possible immigration consequences of a criminal conviction or an adjudication in a delinquency case for noncitizen clients. At

least two hours of a lawyer's mandatory continuing legal education training requirements each year should involve training on such immigration consequences. Lawyers should also be familiar with other non-penal consequences of a criminal conviction or delinquency adjudication, such as those affecting driving privileges, public benefits, sex offender registration, residency restrictions, student financial aid, opportunities for military service, professional licensing, firearms possession, DNA sampling, HIV testing, among others.

5. Before undertaking representation in a criminal or delinquency case, a less experienced lawyer should obtain training in the relevant areas of practice and should consult with others in the field, including nonlawyers. A less experienced lawyer should observe and, when possible, serve as co-counsel to more experienced lawyers prior to accepting sole responsibility for a criminal or delinquency case. More experienced lawyers should mentor less experienced lawyers.
6. Lawyers in delinquency cases and, where relevant, in criminal cases, should develop a basic knowledge of child and adolescent development, including information concerning emotional, social and neurological development that could impact effective communication by the lawyer with clients and the defense of charges against the client. Lawyers in delinquency cases should have training in communicating with youth in a developmentally appropriate way.
7. Lawyers representing youth who are prosecuted in the adult criminal system should have the specialized training and experience of a juvenile defender in addition to the training and experience required to handle the most serious adult criminal cases.
8. A lawyer providing representation in criminal and juvenile delinquency cases should be familiar with key agencies and services typically involved in those cases, such as the Oregon Department of Corrections, local community corrections programs, the Oregon Youth Authority, the Department of Human Services, county Juvenile Departments, private treatment facilities and programs, along with other services and programs available as dispositional alternatives to detention and custody.

Commentary:

The complexity and seriousness of criminal and juvenile delinquency cases require specialized training and expertise in a broad area of law and practical skills. Moreover, as the practice of law in these areas continues to develop, lawyers must devote a substantial amount

of time to on-going training. From complex, ever-changing sentencing schemes to the increased role of scientific evidence and forensic experts, defense lawyers must master not only the skills of trial advocacy but also the complex legal and factual issues attendant to many cases. For instance, recent advances in neuroscience and the understanding of infant and adolescent brain development undermine traditional notions of culpability and blameworthiness for both juvenile and adult offenders, requiring defense lawyers to learn the pertinent scientific principles and present them as evidence in appropriate cases. Likewise, as computers, smartphones and other electronic devices become an integral part of everyday life for most youth and adults, counsel must understand and utilize their evidentiary potential.

As criminal and delinquency cases have become more serious and complex, the collateral consequences of convictions and adjudications have become more numerous and significant. Lawyers must now understand and explain the immigration consequences of a criminal conviction to noncitizen clients in order to fulfill the Sixth Amendment rights of those clients.<sup>18</sup> Depending upon the particular circumstances of a client, other collateral consequences may be just as important as deportation, requiring a lawyer to understand and seek to mitigate the impact of a conviction on a client's employment, housing, public assistance, schooling and other fundamental life activities.

The increased complexity and seriousness of criminal and delinquency cases require lawyers to take advantage of membership organizations that provide not only seminars and other training but also access to blogs, listservs, videos, motions and memoranda, and other online resources that alert lawyers to the latest developments in a pertinent area of law, provide a forum to seek case-specific guidance, and promote a culture of zealous, client-centered representation. The days of the solo practitioner toiling alone are in the past. In Oregon, the Oregon Criminal Defense Lawyers Association, the Oregon State Bar, the National Association of Criminal Defense Lawyers and the National Juvenile Defender Center help provide the tools essential to successful practice in these areas. While direct peer-to-peer consultation, mentoring or guidance remains important, membership in an organization focused on criminal and juvenile defense has become the norm for best practices in Oregon.

### **STANDARD 1.3 – OBLIGATIONS OF DEFENSE COUNSEL REGARDING WORKLOAD**

**Before agreeing to act as counsel or accept appointment by a court, a lawyer has an obligation to make sure that he or she has sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a criminal matter or a youth in a**

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<sup>18</sup> *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L Ed 2d 284 (2010).



**delinquency case. If it later appears that the lawyer is unable to offer quality representation in the case, the lawyer should move to withdraw.**

Implementation:

1. A lawyer, whether court-appointed or privately retained, should not accept workloads that, by reason of size or complexity, interfere with the ability of the lawyer to meet professional obligations to each client.
2. A lawyer should have access to sufficient support services and resources to allow for quality representation.

Commentary:

In 2007, the Oregon State Bar (OSB) Board of Governors approved Formal Ethics Opinion No. 2007-178, which was based upon the American Bar Association Formal Ethic Opinion No. 06-441, entitled “Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation.” The OSB opinion, which makes clear that it addresses appointed and retained counsel, commands lawyers to control their workloads to enable them to discharge their ethical obligations “to provide each client with competent and diligent representation, keep each client reasonably informed about the status of his or her case, explain each matter to the extent necessary to permit the client to make informed decisions regarding the representation, and abide by the decisions that the client is entitled to make.” The opinion observes, quoting the ABA opinion, that for every client a lawyer is required to “keep abreast of changes in the law; adequately investigate, analyze, and prepare cases; act promptly on behalf of clients; and communicate effectively on behalf of and with clients[.]” The opinion observes that a “lawyer who is unable to perform these duties may not undertake or continue with representation of a client.”

**STANDARD 2.1 – OBLIGATIONS OF DEFENSE COUNSEL AT INITIAL APPEARANCE**

**At the initial court appearance in a criminal or delinquency case, a lawyer should inform the client of the offenses alleged in the charging instrument or petition, assert pertinent statutory and constitutional rights of the client on the record and, where appropriate, attempt to secure the pretrial release of detained clients under the conditions most favorable and acceptable to the client.**

## Implementation:

1. A lawyer should be familiar with the law regarding initial appearance, arraignment, and juvenile detention.
2. A lawyer should be familiar with the local practice regarding case docketing and processing so that the lawyer may inform the client regarding expected case events and the dates for upcoming court appearances.
3. A lawyer should be prepared to enter an appropriate assertion that preserves the client's rights and demands due process, whether that is a not guilty plea or a denial of the allegations in a delinquency petition, demand for preliminary hearing or request for some other further proceeding. A lawyer should make clear that the defendant reserves the following rights in the present and any other matter:
  - a. Right to remain silent under State and Federal Constitutions;
  - b. Right to counsel under State and Federal Constitutions;
  - c. Right to file challenges to the charging instrument or petition;
  - d. Right to file challenges to the evidence;
  - e. Right to file notices of affirmative defenses; and
  - f. Right to a speedy trial.
4. A lawyer should be prepared to object to the court's failure to comply with the law regarding the initial appearance process, such as the statute requiring an ability to confer confidentially with the client during a video arraignment.
5. If the client is in custody, a lawyer should seek release from custody or detention (See Standard 2.3).
6. A lawyer should obtain all relevant documents and orders that pertain to the client's initial appearance.
7. A lawyer may waive formal reading of the allegations and advice of rights by the court, providing the lawyer advises the client what rights are waived, the nature of the charges, and the potential consequences of relinquishing his rights.

8. If the adjudicatory judge is assigned at the initial appearance, the lawyer must be familiar with the law and local practice for filing motions to disqualify a judge, discuss this with the client, and be prepared to timely file appropriate documents challenging an assigned judge.

Commentary:

While substantive law has been largely standardized throughout the state, court procedural rules still vary significantly by county or judicial district. A lawyer should be familiar with the local practice codified in the Supplementary Local Rules (SLRs) as well as those preserved only as oral tradition (the local unwritten rules). Because Oregon allows for self-bail on posting security, the lawyer should be familiar with local sheriff office practices regarding posting security and when deposited moneys will be available to clients.

Jurisdictions vary on when a trial judge is actually assigned and, therefore, the time for filing motions for change of judge will vary. Some counties require all plea discussions to occur prior to entry of the not guilty plea, but will often set over plea entry to allow for discovery and negotiations. Some counties will stick closely to the time requirements in the Uniform Trial Court Rules, but constitutional due process rights may trump a jurisdiction's procedural requirements or administrative rules.<sup>19</sup>

## **STANDARD 2.2 – CLIENT CONTACT AND COMMUNICATION**

**A lawyer should conduct a client interview as soon as practicable after representation begins and thereafter establish a procedure to maintain regular contact with the client in order to explain the allegations and nature of the proceedings, meet the ongoing needs of the client, obtaining necessary information from the client, consult with the client about decisions affecting the course of the defense and to respond to requests from the client for information or assistance concerning the case.**

Implementation:

1. A lawyer should provide a clear explanation, in developmentally appropriate language, of the role of both the client and the lawyer, and demonstrate appropriate commitment to the client's expressed interests in the outcome of the proceedings. A lawyer should

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<sup>19</sup> *State v. Owens*, 68 Or. App. 343 (1984).

elicit the client's point of view and encourage the client's full participation in the defense of the case.

2. The initial interview should be in person, in a private setting that allows for a confidential conversation. When the client is a youth, a lawyer should not allow parents or other people to participate in the initial meeting with the client, in order to maintain privileges and assure that the client knows the communication is confidential.
3. If the client is in custody and a release or detention hearing is pending, the lawyer should be familiar with the law regarding detention, the criteria for release and discuss with the client release factors and resources available to the client to obtain pretrial release.
4. At the initial meeting, the lawyer should review the charges facing the client and be prepared to discuss the necessary elements of the charges, the procedure the client will be facing in subsequent court appearances, and inquire if the client has any immediate needs regarding securing evidence or obtaining release.
5. Prior to all meetings, the lawyer should:
  - a. Be familiar with the elements of the charged offense(s) and the potential punishment;
  - b. Obtain copies of any relevant documents that are available including any charging documents, recommendations and reports made by agencies concerning pretrial release and law enforcement reports that might be available;
  - c. Be familiar with the legal procedure the client will encounter and be prepared to discuss the process with the client;
  - d. If a client is in custody, be familiar with the different types of pretrial release conditions the court may set and whether private or public agencies are available to act as a custodian for the client's release, and in a juvenile proceeding be prepared to discuss the process of ongoing detention review.
6. During an initial interview with the client, a lawyer should:
  - a. Obtain information concerning:
    - 1) The client's ties to the community, including the length of time he or she has lived at current and former addresses, family relationships, immigration status (if applicable), employment record and history;

- 2) The client's history of service in the military, if any;
  - 3) The client's physical and mental health, educational and military services records;
  - 4) The client's immediate medical needs;
  - 5) The client's past criminal record, if any, including arrests and convictions for adult and juvenile offenses and prior record of court appearances or failure to appear in court; counsel should also determine whether the client has any pending charges and also whether he or she is on probation or parole and the client's past or present performance under supervision;
  - 6) The ability of the client to meet any financial conditions of release;
  - 7) The names of individuals, or other sources, that counsel can contact to verify the information provided by the client; and the client's permission to contact these individuals;
- b. Provide to the client information including but not limited to:
- 1) An explanation of the procedures that will be followed in setting the conditions of pretrial release;
  - 2) An explanation of the type of information that will be requested in any interview that may be conducted by a pretrial release agency and also an explanation that the client should not make statements concerning the offense;
  - 3) An explanation of the lawyer-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the lawyer;
  - 4) The charges and the potential penalties, as well as potential collateral consequences, of any conviction and sentence;
  - 5) A general procedural overview of the progression of the case, where possible;
  - 6) Advice that communication with people other than the defense team is not privileged and, if the client is in custody, may be monitored.
7. A lawyer should use any contact with the client as an opportunity to gather timely information relevant to preparation of the defense. Such information may include, but is not limited to:
- a. The facts surrounding the charges against the client;
  - b. Any evidence of improper police investigative practices or prosecutorial conduct that affects the client's rights;

- c. Any possible witnesses who should be located;
- d. Any evidence that should be preserved;
- e. Where appropriate, evidence of the client's competence to stand trial and/or mental state at the time of the offense.

Commentary:

The purpose of the initial contact is to quickly ascertain and identify work that needs to be done to prepare for the defense, including documenting the status or condition of evidence that could be lost, such as injuries to the defendant or crime scene conditions; establishing a relationship with the client; informing the client of the charges against him or her and the possible consequences; and reviewing next steps such as preparing for a release hearing or preliminary hearing. The relationship between a criminal defendant or youth charged with delinquency and a lawyer will be directly affected by the quality of their communication, which starts with the initial interview where the lawyer can provide the client important information and obtain relevant case information from the client. There is a strong correlation between good lawyer/client communication and the lack of complaints from clients about poor representation or requests for substitute counsel. If this correlation is more than coincidence then it is likely that the key to successful representation is good communication that begins with a timely and thorough initial interview.

The duty to communicate is found in Oregon Rule of Professional Conduct 1.4 and forms a core duty that the lawyer owes the client. Aside from addressing the immediate needs of the client to secure release or preserve evidence, the initial interview (along with subsequent meetings) forms the source of another core duty, the duty to investigate. A review of information with the client may assist in determining who needs to be interviewed or what evidence may need expert evaluation.

Communication and contact with the client is an important source for the lawyer to assess the client's mental status to understand the proceedings. The lawyer should make note of concerns and consult appropriate experts regarding concerns over competency.

**STANDARD 2.3 – RELEASE OF CLIENT**

- A. A lawyer has a duty to seek release from custody or detention of clients under the conditions most favorable and acceptable to the client.**
- B. Release should be sought at the earliest possible opportunity and if not successful a lawyer should continue to seek release at appropriate subsequent hearings.**

### Implementation:

1. If the client is in custody or detention, the lawyer should review the documents supporting probable cause and, if appropriate, challenge any finding of probable cause. In all cases where detention continues, the lawyer should move for release if appropriate or ask that bail be reduced to an amount the client can afford.
2. If the court will not consider release at initial appearance, the lawyer should request a release hearing and decision within the statutory time requirements. In delinquency proceedings, the lawyer should be familiar with the law and procedures for detention hearings and the risk factors that the court is likely or required to consider. In criminal cases, at any release hearing, the lawyer should be familiar with the statutory criteria for release and be prepared to address those release factors on the record.
3. In preparation for a release hearing the lawyer should discuss statutory release criteria with the client and be prepared to address the court regarding these factors including residence, employment, compliance with release conditions such as no contact with victims and any release compliance monitoring.
4. If the client is subject to release on security, the lawyer should be familiar with the rules and requirements to post security, including procedures for client “self-bailing” with funds from an inmate account, posting a security interest in property, or third party posting requirements.

### **STANDARD 3 - INVESTIGATION**

**A lawyer has the duty to conduct an independent review of the case, regardless of the client’s admissions or statements to the lawyer of facts constituting guilt or the client’s stated desire to plead guilty or admit guilt. Where appropriate, the lawyer should engage in a full investigation, which should be conducted as promptly as possible and should include all information, research, and discovery necessary to assess the strengths and weaknesses of the case, to prepare the case for trial or hearing, and to best advise the client as to the possibility and consequences of conviction or adverse adjudication. The lawyer should not knowingly use illegal means to obtain evidence or instruct others to do so.**

## Implementation:

1. A lawyer should obtain copies of all charging documents and should examine them to determine the specific charges that have been brought against the client.
2. A lawyer should engage in research, including a review of all relevant statutes and case law, in order to determine:
  - a. The necessary elements of the charged offenses;
  - b. Any defects in the charging instrument, both constitutional and non-constitutional, including statute of limitations and double jeopardy;
  - c. Whether the court's jurisdiction can be challenged;
  - d. Applicability of defenses, ordinary and affirmative, including defenses based on mental disease or defect, diminished capacity, or partial responsibility, and whether any notice of such defenses is required and specific timelines for giving notice; and
  - e. Potential consequences of conviction or adverse adjudication, including those relating to immigration and possible deportation.
3. A lawyer should conduct an in-depth interview with the client as described in [Standard 2.2](#). The interview should be used to identify:
  - a. Additional sources of information concerning the incidents or events giving rise to the charges and to any defenses;
  - b. Evidence concerning improper conduct or practices by law enforcement, juvenile authorities, mental health departments, or the prosecution, which may affect the client's rights or the admissibility of evidence;
  - c. Information relevant to the court's jurisdiction;
  - d. Information relevant to pretrial or prehearing release and possible pretrial or prehearing disposition; and
  - e. Information relevant to sentencing or disposition and potential consequences of conviction or adverse adjudication.
4. A lawyer should consider whether to interview potential witnesses, whether adverse, neutral, or favorable, and when new evidence is revealed during the course of witness interviews, the lawyer should locate and assess its value to the client. Witness interviews should be conducted by an investigator or in the presence of a third person who will be available, if necessary, to testify as a defense witness at the trial or hearing.



When speaking with third parties, the lawyer has a duty to comply with the Oregon Rules of Professional Conduct, including Rule 3.4 (Fairness to Opposing Party and Counsel), 4.1 (Truthfulness in Statements to Others), 4.2 (Communication with Person Represented by Counsel), and 4.3 (Dealing with Unrepresented Persons). The lawyer also has a duty, where appropriate, to comply with statutory rights of victims, such as those embodied in ORS 135.970(2) and (3).

5. A lawyer should attempt to interview all law enforcement officers involved in the arrest and investigation of the case and should obtain all pertinent information in the possession of the prosecution, juvenile authorities, or law enforcement, including, where relevant, law enforcement personnel records and documentation of prior officer misconduct. In cases involving child witnesses or victims, the lawyer should seek records of counseling sessions with those children. The lawyer should pursue formal and informal discovery with authorities as described in Standard 4.1.
6. Where appropriate, a lawyer should inspect the scene of the alleged offense under circumstances (including weather, lighting conditions, and time of day) as similar as possible to those existing at the time of the alleged incident.
7. Where appropriate, a lawyer should obtain school, mental health, medical, drug and alcohol, immigration, and prior criminal offense and juvenile records of the client and witnesses.

Commentary:

A skilled and knowledgeable lawyer will be of little use to a client without a thorough understanding of the facts of a case. As explained in the Commentary to the *National Juvenile Defense Standards*:

Most cases are won on facts, not legal arguments, and it is investigation that uncovers the facts. The facts are counsel's most important asset, not only in litigating the case at trial, but in every other function counsel performs, including negotiating for reduced or dismissed charges, diversion, or a plea agreement, as well as influencing a favorable disposition.

An investigation is important even when the client has admitted culpability or expresses a desire to plead guilty. An investigation may yield evidence that can lead to suppression of key state evidence, negate or block the

admissibility of state evidence, or limit the client's liability. Even if the investigation does not result in an acquittal or dismissal, it may yield evidence that can be useful in negotiating a more favorable plea agreement or mitigation of disposition.<sup>20</sup>

## **STANDARD 4.1 – DISCOVERY**

**A lawyer has the duty to pursue formal and informal discovery in a prompt fashion and to continue to pursue opportunities for discovery throughout the case.**

### **Implementation:**

1. A lawyer should be familiar with all applicable statutes, rules and case law governing discovery, including those concerning the processes for filing motions to compel discovery or to preserve evidence, as well as those making sanctions available when the prosecution has engaged in discovery violations.
2. A lawyer should also be familiar with and observe the applicable statutes, rules and case law governing the obligation of the defense to provide discovery. A lawyer should file motions for protective orders or otherwise resist discovery where a lawful basis exists to shield information in the possession of the defense from disclosure.
3. A lawyer should make a prompt and comprehensive demand for discovery pursuant to applicable rules and constitutional provisions and should continually seek all information to which the client is entitled, especially any exculpatory, impeaching and mitigating evidence. Discovery should include, but is not limited to, the following:
  - a. Potentially exculpatory, impeaching and mitigating information;
  - b. Law enforcement reports and notes, 911 recordings and transcripts, inter-officer transmissions, dispatch reports, and reports or notes of searches or seizures and the circumstances in which they were accomplished;
  - c. Written communications, including emails, between prosecution, law enforcement and/or witnesses;
  - d. Names and addresses of prosecution witnesses, their prior statements, their prior criminal records and their relevant digital, electronic and social media postings;

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<sup>20</sup> National Juvenile Defender Center, *National Juvenile Defense Standards*, Sec. 4.1, at 68-69 (citations omitted).

- e. Oral or written statements by the client and the circumstances under which those statements were made;
  - f. The client's prior criminal or juvenile record and evidence of any other misconduct that the prosecution may intend to use against the client;
  - g. Copies of, or the opportunity to inspect books, papers, documents, photographs, computer data, tangible objects, buildings or places, and other material relevant to the case;
  - h. Results or reports of physical or mental examinations, and of scientific tests or experiments, and the data and documents on which they are based;
  - i. Statements and reports of experts and the data and documents on which they are based; and
  - j. Statements of co-defendants.
4. A lawyer should consider filing motions seeking to preserve evidence where it is at risk of being destroyed or altered.

## **STANDARD 4.2 – THEORY OF THE CASE**

**A lawyer should develop and continually reassess a theory of the client's case that advances the client's goals and encompasses the realities of the client's situation.**

### **Implementation:**

1. A lawyer should use the theory of the case when evaluating strategic choices throughout the course of the representation.
2. A lawyer should allow the theory of the case to focus the investigation and trial or hearing preparation, seeking out and developing facts and evidence that the theory makes material.
3. A lawyer should remain flexible enough to modify or abandon the theory if it does not serve the client.

### **Commentary:**

The theory of the case is a construct that can guide the preparation and presentation of a case. A theory of the case should explain the facts of the case in such a way that a judge or jury will understand why the client is entitled to a favorable verdict. As such, it is first and

foremost a factual narrative that presents the client’s story in straightforward common sense terms that support a favorable verdict under the law applicable to the case. It must be informed by thorough investigation and preparation so that a lawyer will know which facts a judge or jury is likely to accept as proven. It must also account for what fact finders are likely to believe based upon their own life experiences. Finally, a theory of the case must account for the jury instructions and other law applicable to the case. Although a theory of the case should be developed early in the representation of a client and be largely built upon the client’s version of events, a lawyer must be able to revisit and revise the theory, in consultation with the client, as investigation and preparation continue to develop the facts that a judge or jury are likely to accept as true at the conclusion of the trial.

## **STANDARD 5.1 – PRETRIAL MOTIONS AND NOTICES**

**A lawyer should research, prepare, file and argue appropriate pretrial motions and notices whenever there is reason to believe the client may be entitled to relief.**

### Implementation:

1. The decision to file a particular pretrial motion or notice should be made after thorough investigation and after considering the applicable law in light of the circumstances of the case.
2. Among the issues the lawyer should consider addressing in pretrial motions are:
  - a. The pretrial custody of the accused;
  - b. The competency or fitness to proceed the accused (see Standard 5.3);
  - c. The constitutionality of relevant statutes;
  - d. Potential defects in the charging process or instrument;
  - e. The sufficiency of the charging document;
  - f. The severance of charges and/or co-defendants for trial;
  - g. Change of venue;
  - h. The removal of a judicial officer from the case through requests for recusal or the filing of an affidavit of prejudice;
  - i. The discovery obligations of both the prosecution and the defense, including:

- 1) Motions for protective orders;
  - 2) *Brady v. Maryland*<sup>21</sup> motions; and
  - 3) Motions to compel discovery.
- j. Violations of federal and/or state constitutional or statutory provisions, including:
- 1) Illegal searches and/or seizures;
  - 2) Involuntary statements or confessions;
  - 3) Statements obtained in violation of the right to counsel or privilege against self-incrimination;
  - 4) Unreliable identification evidence;
  - 5) Speedy trial rights; and
  - 6) Double jeopardy protections.
- k. Requests for, and challenges to denial of, funding for access to reasonable and necessary resources and experts, such as:
- 1) Interpreters;
  - 2) Mental Health Experts;
  - 3) Investigative services; and
  - 4) Forensic services.
- l. The right to a continuance in order to adequately prepare and present a defense or to respond to prosecution motions;
- m. Matters of trial evidence that may be appropriately litigated by means of a pretrial motion *in limine*, including:
- 1) The competency or admissibility of particular witnesses, including experts and children;
  - 2) The use of prior convictions for impeachment purposes;
  - 3) The use of prior or subsequent bad acts;
  - 4) The use of reputation or other character evidence; and
  - 5) The use of evidence subject to “rape shield” protections.
- n. Notices of affirmative defenses and other required notices to present particular evidence;
- o. The dismissal of charges on the basis of a civil compromise, best interests of a youth in delinquency cases, in the furtherance of justice and the general equitable powers of the court.
3. Before deciding not to file a motion or to withdraw a motion already filed, a lawyer should carefully consider all facts in the case, applicable law, case strategy and other relevant information, including:

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<sup>21</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

- a. The burden of proof, the potential advantages and disadvantages of having witnesses testify at pretrial hearings and to what extent a pretrial hearing reveals defense strategy to a client's detriment;
- b. Whether a pretrial motion may be necessary to protect the client's rights against later claims of waiver, procedural default or failure to preserve an issue for later appeal;
- c. The effect the filing of a motion may have upon the client's speedy trial rights; and
- d. Whether other objectives, in addition to the ultimate relief requested by a motion, may be served by the filing and litigation of a particular motion.

## **STANDARD 5.2 – FILING AND ARGUING PRETRIAL MOTIONS**

**A lawyer should prepare for a motion hearing just as he or she would prepare for trial, including preparing for the presentation of evidence, exhibits and witnesses.**

### **Implementation:**

1. Motions should be timely filed, comport with the formal requirements of the court and succinctly inform the court of the authority relied upon.
2. When a hearing on a motion requires taking evidence, a lawyer's preparation should include:
  - a. Investigation, discovery and research relevant to the claims advanced;
  - b. Subpoenaing all helpful evidence and witnesses;
  - c. Preparing witnesses to testify; and
  - d. Fully understanding the applicable burdens of proof, evidentiary principles and court procedures, including the costs and benefits of having the client or other witnesses testify and be subject to cross examination.
3. A lawyer should consider the strategy of submitting proposed findings of fact and conclusions of law to the court at the conclusion of the hearing.
4. After an adverse ruling, a lawyer should consider seeking interlocutory relief, if available, taking necessary steps to perfect an appeal and renewing the motion or objection during trial in order to preserve the matter for appeal.

## **STANDARD 5.3 – PRETRIAL DETERMINATION OF CLIENT’S FITNESS TO PROCEED**

**A lawyer must be able to recognize when a client may not be competent to stand trial and take appropriate action.**

### Implementation:

1. A lawyer must learn to recognize when a client’s ability to aid and assist in the proceedings may be compromised due to mental health disorders, developmental immaturity or developmental and/or intellectual disabilities.
2. A lawyer must assess whether the client’s level of functioning limits his or her ability to communicate effectively with counsel, as well as his or her ability to have a factual and rational understanding of the proceedings.
3. When a lawyer has reason to doubt the client’s competency to stand trial, the lawyer should gather information and consider filing a pretrial motion requesting a competency determination.
4. In deciding whether to request a competency determination, a lawyer must consider, among other things:
  - a. His or her obligations, under Oregon Rule of Professional Conduct 1.14, to maintain a normal attorney-client relationship, to the extent possible, with a client with diminished capacity; and
  - b. The likely consequences of a finding of incompetence and whether there are other ways to resolve the case, such as dismissal upon obtaining services for the client or referral to other agencies.
5. If the lawyer decides to proceed with a competency hearing, he or she should secure the services of a qualified expert. When the client is a youth, such an expert should be versed in the emotional, physical, cognitive and language impairments of children and adolescents; the forensic evaluation of youth; the competence standards and accepted criteria used in evaluating juvenile competence; and effective interventions or treatment for youth.

6. If a court finds an adult client incompetent to proceed, a lawyer should advocate for the least restrictive level of supervision and the least intrusive treatment available. If the client is a youth, a lawyer should seek to resolve the delinquency case by having the petition converted to a dependency petition or through a motion to dismiss in the best interests of the youth.
7. If a court finds a client is competent to proceed, a lawyer should continue to raise the matter during the course of the proceedings if the lawyer has a good faith concern about the client's continuing competency to proceed and in order to preserve the matter for appeal.

#### **STANDARD 5.4 – CONTINUING OBLIGATIONS TO FILE OR RENEW PRETRIAL MOTIONS OR NOTICES**

**During trial or subsequent proceedings, a lawyer should be prepared to raise any issue which is appropriately raised pretrial but could not have been so raised because the facts supporting the motion were unknown or not reasonably available. Counsel should also be prepared to renew a pretrial motion if new supporting information is disclosed in later proceedings.**

##### Commentary:

In many cases, the dispositive issue may concern some issue other than whether the client committed the alleged offense. Invariably, these issues should be the subject of pretrial motions, supported by thorough factual investigation and legal research. The range of such issues is broad, as illustrated by the foregoing standard. The timing of motions is a strategic consideration and a function of court rule and, in many instances, local court practice. In every case, in order to determine whether to litigate a pretrial motion, a lawyer must be knowledgeable about current developments in the defense of criminal and delinquency cases and be skilled in presenting evidence and arguments on complex legal issues.

The potential advantages of litigating pretrial motions are many. This point is perhaps best summarized by the commentary on this subject in the [National Juvenile Defense Standards](#), which reads as follows:

Pre-trial motions hearings provide immediate and long-term benefits. Immediately, counsel has the opportunity to convince the judge that the case should be dismissed, or at the very least that certain evidence should



be suppressed. Counsel also has the benefit of additional discovery through the state's responses to the motion prior to trial.

In the long-term, when motions generate a hearing, counsel can gain invaluable opportunities to pin down prosecution witnesses on the record and develop transcripts that could be used to impeach the witnesses with their prior inconsistent statements. Counsel has the opportunity to strengthen his or her relationship with the client through a demonstration of counsel's willingness to fight for the client. Because in many jurisdictions the vast majority of cases are resolved through a plea agreement, pre-trial motions practice may have an enormous impact on the kind of plea offer the prosecutor is willing to consider.<sup>22</sup>

## **STANDARD 6.1 - EXPLORATION OF DISPOSITION WITHOUT TRIAL**

**A lawyer has the duty to explore with the client the possibility, advisability and consequences of reaching a negotiated disposition of charges or a disposition without trial. A lawyer has the duty to be familiar with the laws, local practices and consequences concerning dispositions without trial.**

### Implementation:

1. A lawyer should explore and consider mediation, civil compromise, diversion, Formal Accountability Agreements, having the case filed as a juvenile delinquency or dependency case, alternative dispositions including conditional postponement, motion to dismiss in the interest of justice, negotiated pleas or disposition agreements, and other non-trial dispositions.
2. A lawyer should explain to the client the strengths and weaknesses of the prosecution's case, the benefits and consequences of considering a non-trial disposition and discuss with the client any options that may be available to the client and the rights the client gives up by pursuing a non-trial disposition.
3. A lawyer should assist the client in weighing whether there are strategic advantages to be gained by taking a plea or whether the sentence or disposition results would likely be the same.

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<sup>22</sup> National Juvenile Defender Center, *National Juvenile Defense Standards*, Sec. 4.8, at 81-82.

4. With the consent of the client, a lawyer should explore with the prosecutor and, in juvenile cases, the juvenile court counselor, when appropriate, available options to resolve the case without trial. The lawyer should obtain information about the position the prosecutor and juvenile court counselor will take as to non-plea dispositions and recommendations that will be made about sentencing or disposition. Throughout negotiation, a lawyer must zealously advocate for the expressed interests of the client, including advocating for some benefit for the client in exchange for a plea.
5. A lawyer cannot accept any negotiated settlement or agree to enter into any non-trial disposition without the client's express authorization.
6. A lawyer must keep the client fully informed of continued negotiations and convey to the client any offers made by the prosecution or recommendations by the juvenile court counselor for a negotiated settlement. The lawyer must assure that the client has adequate time to consider the plea and alternative options.
7. A lawyer should continue to take steps necessary to preserve the client's rights and advance the client's defenses even while engaging in settlement negotiations.
8. Before conducting negotiations, a lawyer should be familiar with:
  - a. The types, advantages and disadvantages, and applicable procedures and requirements of available pleas or admissions to juvenile court jurisdiction, including a plea or admission of guilty, no contest, a conditional plea or admission of guilty that reserves the right to appeal certain issues, and a plea or admission in which the client is not required to acknowledge guilt (*Alford* plea);
  - b. Whether agreements between the client and the prosecution would be binding on the court or on the prison, juvenile, parole and probation, and immigration authorities; and
  - c. The practices and policies of the particular prosecuting authorities, juvenile authorities and judge that may affect the content and likely results of any negotiated settlement.
9. A lawyer should be aware of, advise the client of, and, where appropriate, seek to mitigate the following, where relevant:
  - a. Rights that the client would waive when entering a plea or admission disposing of the case without trial;

- b. The minimum and maximum term of incarceration that may be ordered, including whether the minimum disposition would be indeterminate, possible sentencing enhancements, probation or post-confinement supervision, alternative incarceration programs and credit for pretrial detention;
- c. The likely disposition given sentencing guidelines;
- d. The minimum and maximum fines and assessments, court costs that may be ordered and the restitution that is being requested by the victim(s);
- e. Arguments to eliminate or reduce fines, assessments and court costs, challenges to liability for and the amount of restitution, the possibilities of civil action by the victim(s), and asset forfeiture, and the availability of work programs to pay restitution and perform community service;
- f. Consequences relating to previous offenses;
- g. The availability and possible conditions of protective supervision, conditional postponement, probation, parole, suspended sentence, work release, conditional leave and earned release time;
- h. The availability and possible conditions of deferred sentences, conditional discharges, alternative dispositions and diversion agreements;
- i. For non-citizen juvenile clients, the possibility of temporary and permanent immigration relief through the available legislative or administrative immigration programs and Special Immigrant Juvenile Status;
- j. For non-citizen clients, the possibility of adverse immigration consequences;
- k. For non-citizen clients, the possibility of criminal consequences of illegal re-entry following conviction and deportation;
- l. The possibility of other consequences of conviction, such as:
  - 1) Requirements for sex offender registration, relief and set-aside;
  - 2) DNA sampling, AIDS and STD testing;
  - 3) Loss of civil liberties such as voting and jury service privileges;
  - 4) Effect on driver's or professional licenses and on firearms possession;
  - 5) Loss of public benefits;
  - 6) Loss of housing, education, financial aid, career, employment, vocational or military service opportunities; and
  - 7) Risk of enhanced sentences for future convictions.
- m. The possible place and manner of confinement, placement, or commitment;
- n. The availability of pre-and post-adjudication diversion programs and treatment programs;
- o. Standard sentences for similar offenses committed by offenders with similar backgrounds; and
- p. The confidentiality of juvenile records and the availability of expungement.

10. A lawyer should identify negotiation goals with the following in mind:

- a. Concessions that the client might offer to the prosecution, including an agreement:
  - 1) Not to contest jurisdiction;
  - 2) Not to dispute the merits of some or all of the charges;
  - 3) Not to assert or litigate certain rights or issues;
  - 4) To fulfill conditions of restitution, rehabilitation, treatment or community service; and
  - 5) To provide assistance to law enforcement or juvenile authorities in investigating and prosecuting other alleged wrongful activity.
- b. Benefits to the client, including an agreement:
  - 1) That the prosecution will refile allegations in juvenile court and will not contest juvenile court jurisdiction;
  - 2) That the prosecution will not oppose release pending sentence, disposition or appeal;
  - 3) That the client may reserve the right to contest certain issues;
  - 4) To dismiss or reduce charges immediately or upon completion of certain conditions;
  - 5) That the client will not be subject to further investigation for uncharged conduct;
  - 6) That the client will receive, subject to the court's agreement, a specified set or range of sanctions;
  - 7) That the prosecution will take, or refrain from taking, a specified position with respect to sanctions, and/or that the prosecution will not present preparation of a pre-sentence report, or in determining the client's date of release from confinement; and
  - 8) That the client will receive, or that the prosecution will recommend, specific benefits concerning the place and manner of confinement, conditions of parole or probationary release and the provision of pre- or post-adjudication treatment programs.

11. A lawyer has the duty to inform the client of the full content of any tentative negotiated settlement or non-trial disposition, and to explain to the client the advantages, disadvantages, and potential consequences of the settlement or disposition.

12. A lawyer should not recommend that the client enter a dispositional plea or admission unless appropriate investigation and evaluation of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced if the case were to go forward.

## **STANDARD 6.2 – ENTRY OF DISPOSITIONAL PLEA OR ADMISSION**

**A decision to enter a plea resolving the charges, or to admit the allegations, rests solely with the client. The lawyer must not unduly influence the decision to enter a plea and must ensure that the client’s acceptance of the plea is voluntary and knowing, and reflects an intelligent understanding of the plea and the rights the client will forfeit.**

### **Implementation:**

1. A lawyer has the duty to explain to the client the advantages, disadvantages and consequences of resolving the case by entering a dispositional plea or by admitting the allegations.
2. A lawyer has the duty to explain to the client the nature of the hearing at which the client will enter the plea or admission and the role that the client will play in the hearing, including participating in the colloquy to determine voluntary waiver of rights and answering other questions from the court and making a statement concerning the offense. The lawyer should be familiar with the Model Colloquy for juvenile waiver of the right to trial. The lawyer should explain to the client that the court may in some cases reject the plea.
3. At the hearing, a lawyer has the duty to assist the client and to ensure that :
  - a. Any plea petition is legible and accurate and clearly sets forth terms beneficial to the client;
  - b. The court, on the record using any applicable model colloquy, inquires into whether the client’s decision is knowing, voluntary, and intelligent;
  - c. The court enters the plea or admission only after finding that the client’s decision was knowing, voluntary and intelligent; and
  - d. The judicial record is legible, clear, accurate and contains the full contents and conditions of the client’s plea or admission.

4. If during the plea hearing, the client does not understand questions being asked by the court, the lawyer must request a recess to assist the client.

### **STANDARD 7.1 – GENERAL TRIAL PREPARATION**

- A. A trial or juvenile adjudicatory hearing (hereinafter referred to as a trial) is a complex event requiring preparation, knowledge of applicable law and procedure, and skill. A defense lawyer must be prepared on the law and facts, and competently plan a challenge to the state’s case and, where appropriate, presentation of a defense case.**
- B. The decision to proceed to trial with or without a jury rests solely with the client. The lawyer should discuss the relevant strategic considerations of this decision with the client.**
- C. A lawyer should develop, in consultation with the client, an overall defense strategy for the conduct of the trial.**

#### **Implementation:**

1. A lawyer should ordinarily have the following materials available for use at trial:
  - a. Copies of all relevant documents filed in the case;
  - b. Relevant documents prepared by investigators;
  - c. Voir dire questions;
  - d. Outline or draft of opening statement;
  - e. Cross-examination plans for all possible prosecution witnesses;
  - f. Direct examination plans for all prospective defense witnesses;
  - g. Copies of defense subpoenas;
  - h. Prior statements of all prosecution witnesses (e.g., transcripts, police reports);
  - i. Prior statements of all defense witnesses;
  - j. Reports from experts;
  - k. A list of all exhibits and the witnesses through whom they will be introduced;
  - l. Originals and copies of all documentary exhibits;
  - m. Proposed jury instructions with supporting authority;
  - n. Copies of all relevant statutes and cases;
  - o. Evidence codes and relevant statutes and/or compilations of evidence rules and criminal or juvenile law most likely to be relevant to the case;
  - p. Outline or draft of closing argument; and

- q. Trial memoranda outlining any complex legal issues or factual problems the court may need to decide during the trial.
2. A lawyer should be fully informed as to the rules of evidence, the law relating to all stages of the trial process and be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the trial. The lawyer should analyze potential prosecution evidence for admissibility problems and develop strategies for challenging inadmissible evidence. The lawyer should be prepared to address objections to defense evidence or testimony. The lawyer should be prepared to raise affirmative defenses. The lawyer should consider requesting that witnesses be excluded from the trial.
3. A lawyer should evaluate whether expert testimony is necessary and beneficial to the client. If so, the lawyer should seek an appropriate expert witness and prepare the witness to testify, including possible areas of cross examination.
4. A lawyer should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the defendant) and, where appropriate, the lawyer should prepare motions and memoranda for such advance rulings.
5. Throughout the trial process, a lawyer should endeavor to establish a proper record for appellate review. As part of this effort, a lawyer should request, whenever necessary, that all trial proceedings be recorded.
6. Where appropriate, a lawyer should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated, a lawyer should be alert to the possible prejudicial effects of the client appearing before the jury in jail or other inappropriate clothing.
7. A lawyer should plan with the client the most convenient system for conferring throughout the trial. Where necessary, a lawyer should seek a court order to have the client available for conferences. A lawyer should, where necessary, secure the services of a competent interpreter/translator for the client during the course of all trial proceedings.
8. Throughout preparation and trial, a lawyer should consider the potential effects that particular actions may have upon sentencing if there is a finding of guilt.

Commentary:

Trial preparation and execution is both an intellectual and logistical exercise. A lawyer must prepare adequately and in a timely manner so that when the trial begins, the lawyer has the necessary exhibits, witnesses, trial materials and any other items necessary during the trial. A lawyer will be performing a number of tasks over the course of trial that must be coordinated so that an adequate defense is presented. A trial judge has a great deal of discretion in managing the courtroom and an unprepared attorney is likely to jeopardize a client's defense.

When appropriate, to preserve an important legal issue or prevent inappropriate comment in opening statement, a lawyer should consider obtaining a pretrial ruling by filing a motion in limine to prevent comment on evidence that may not be ultimately admitted or to inform final analysis of the trial worthiness of a particular case or trial theory.

Expert witnesses present a unique challenge to lawyers. They are chosen for their knowledge base rather than because circumstances made them a percipient witness. The lawyer should evaluate and consider whether a particular expert is helpful to the defense case. Once selected, the expert needs to be given all appropriate information to prepare to testify. Finally, the lawyer should prepare the witness for testimony and anticipate possible lines of cross examination. This preparation can include, where appropriate, a list of questions and it is advisable to have the expert commit to answers prior to calling them as a witness. The expert has his or her own duty as a witness to follow the oath and testify truthfully and therefore the lawyer must determine what the witness will say prior to presenting the witness. If the witness is not helpful to the defense then the witness should not be called to the stand.

**STANDARD 7.2 – VOIR DIRE AND JURY SELECTION**

- A. A lawyer should be prepared to question prospective jurors and to identify individual jurors whom the defense should challenge for cause or exclude by preemptory strikes.**
  
- B. A lawyer should carefully observe the prosecutor's questioning of jurors to inform defense challenges for cause and use of preemptory challenges and to object if the prosecutor is attempting to exclude jurors for impermissible reasons.**



## Implementation:

### *Preparation:*

1. A lawyer should be familiar with the procedures by which a jury is selected in the particular jurisdiction and should be alert to any potential legal challenges to the composition or selection of the venire.
2. A lawyer should be familiar with the local practices and the individual trial judge's procedures for selecting a jury and should be alert to any potential legal challenges to these procedures.
3. Prior to jury selection, a lawyer should seek to obtain a prospective juror list.
4. A lawyer should develop voir dire questions in advance of trial and tailor voir dire questions to the specific case. Among the purposes, voir dire questions should be designed to serve the following:
  - a. To elicit information about the attitudes of individual jurors which will provide the basis for peremptory strikes and challenges for cause;
  - b. To convey to the panel certain legal principles which are critical to the defense case;
  - c. To preview the case for the jurors so as to lessen the impact of damaging information which is likely to come to their attention during the trial;
  - d. To present the client and the defense case in a favorable light, without prematurely disclosing information and the defense case to the prosecutor; and
  - e. To establish a relationship with the jury.
5. A lawyer should be familiar with the law concerning mandatory and discretionary voir dire inquiries so as to be able to defend any request to ask particular questions of prospective jurors.
6. A lawyer should be familiar with the law concerning challenges for cause and peremptory strikes.
7. In a group voir dire, a lawyer should avoid asking questions that may elicit responses that are likely to prejudice other prospective jurors.

8. If the voir dire questions may elicit sensitive answers, a lawyer should request that questioning be conducted outside the presence of the remaining jurors.
9. A lawyer should challenge for cause all persons about whom a legitimate argument can be made for actual prejudice or bias if it is likely to benefit the client.
10. A lawyer should be familiar with the requirements for preserving appellate review of any defense challenges for cause that have been denied.
11. Where appropriate, the lawyer should consider whether to seek expert assistance in the jury selection process.

Commentary:

Highlighting the importance of jury selection, some commentators maintain that trials are won or lost during jury selection. It is also among the most challenging stages of a jury trial, requiring knowledge, training and skill to accomplish successfully. It is the occasion, of course, for a lawyer to seek to remove potential jurors from the trial panel who may be biased against the client or who may not be favorably disposed to the defense case. And it is well recognized that a lawyer has a right to ascertain if a juror is prejudiced against the client, even if that requires broader latitude in time and scope by the judge than originally allowed.<sup>23</sup> But jury selection is also an opportunity for a lawyer to establish a relationship with jurors, to convey legal principles essential to the defense and to place the client and the defense case in a favorable light. To do so successfully, however, requires a thorough understanding of the law applicable to jury selection, a thoughtful and sensitive approach to interpersonal relations and a well-crafted theory of the defense. Without these components, a lawyer may very well do more harm than good during jury selection.

### **STANDARD 7.3 – OPENING STATEMENT**

**An opening statement is a lawyer’s first opportunity to present the defense case. The lawyer should be prepared to present a coherent statement of the defense theory based on evidence likely to be admitted at trial, and should raise and, if necessary, preserve for appeal any objections to the prosecutor’s opening statement.**

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<sup>23</sup> *State v. Williams*, 123 Or. App. 546 (1993).

Best Practice:

1. Prior to delivering an opening statement, a lawyer should ask that the witnesses be excluded from the courtroom, unless a strategic reason exists for not doing so.
2. A lawyer's objective in making an opening statement may include the following:
  - a. Provide an overview of the defense case emphasizing the defense theme and theory of the case;
  - b. Identify the weaknesses of the prosecution's case;
  - c. Emphasize the prosecution's burden of proof;
  - d. Summarize the testimony of witnesses and the role of each witness in relationship to the entire case;
  - e. Describe the exhibits which will be introduced and the role of each exhibit in relationship to the entire case;
  - f. Clarify the jurors' responsibilities;
  - g. State the ultimate inferences which the lawyer wishes the jury to draw; and
  - h. Humanize the client.
3. A lawyer should listen attentively during the state's opening statement in order to raise objections and note potential promises of proof made by the state that could be used in summation.
4. A lawyer should consider incorporating the promises of proof the prosecutor makes to the jury during opening statement in the defense summation.
5. Whenever the prosecutor oversteps the bounds of a proper opening statement, a lawyer should consider objecting, requesting a mistrial or seeking cautionary instructions, unless tactical considerations weigh against any such objections or requests. Such tactical considerations may include, but are not limited to:
  - a. The significance of the prosecutor's error;
  - b. The possibility that an objection might enhance the significance of the information in the jury's mind;
  - c. Whether there are any rulings made by the judge against objecting during the other attorney's opening argument.

6. A lawyer should consider giving an opening statement during a court trial if either the law or facts are sufficiently complex to justify it. In all cases, a lawyer should evaluate if in the particular circumstances giving an opening would help or hurt the client's case. If the consideration is neutral, then the lawyer should give an opening.

Commentary:

The opening statement is the lawyer's opportunity to set forth the defense theory and preview the case for the jury. Judges will vary on their view of the permissible scope of an opening statement. In general, the purpose and rule of opening is for each side to preview their case and offer a summary of any evidence that they have a good faith belief will be admitted at trial. For this reason, a lawyer should consider whether evidence available to the state, but that may have significant prejudice and may be inadmissible, should be challenged prior to opening statements. (See 5.1 on pretrial motions) In the alternative, a lawyer should consider seeking a ruling that the prosecutor be precluded from discussing particular evidence that may or may not be admitted at trial.

Historically, opening statements could be strictly limited to a sterile and bland recitation of what witnesses might say. Objections on argumentative grounds were common and lawyers were restricted from making any conclusions. This has evolved and opening statements in the modern case may include discussions of the law or suggest conclusions that the jury could make. Further, by stipulation or with court permission opening statements can include the use of exhibits that are pre-admitted. Finally, in many cases, effective use of computer graphics and slides may enhance the opening statement, including actual pieces of evidence such as recorded phone calls or videos. When these presentations are used by the state, the lawyer for the defendant should ask to preview it and challenge material that may not be received in evidence.

## **STANDARD 7.4 – CONFRONTING THE PROSECUTION'S CASE**

**The essence of the defense in most cases is confronting the prosecution's case. The lawyer should develop a theme and theory of the case that directs the manner of conducting this confrontation. Whether it is refuting, discrediting or diminishing the state's case, the theme and theory should determine the lawyer's course of action.**

Implementation:

1. A lawyer should attempt to anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for judgment of acquittal.

2. A lawyer should consider the advantages and disadvantages of entering into stipulations concerning the prosecution's case.
3. In preparing for cross-examination, a lawyer should be familiar with the applicable law and procedures concerning cross-examination and impeachment of witnesses. In order to develop material for impeachment, or to discover documents subject to disclosure, a lawyer should be prepared to question witnesses as to the existence of prior statements which they may have made or adopted.
4. In preparing for cross-examination, a lawyer should:
  - a. Consider the need to integrate cross-examination, the theory of the defense and closing argument;
  - b. Consider whether cross-examination of each individual witness is likely to generate helpful information;
  - c. Anticipate those witnesses the prosecutor might call in its case-in-chief or in rebuttal;
  - d. Consider a cross-examination plan for each of the anticipated witnesses;
  - e. Consider an impeachment plan for any witnesses who may be impeachable;
  - f. Be alert to inconsistencies in a witness testimony;
  - g. Be alert to possible variations in witness testimony;
  - h. Review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;
  - i. If available, review investigation reports of interviews and other information developed about the witnesses;
  - j. Review relevant statutes and police procedural manuals and regulations for possible use in cross-examining police witnesses;
  - k. Be alert to issues relating to witness credibility, including bias and motive for testifying.
5. A lawyer should be aware of the applicable law concerning competency of witnesses and admission of expert testimony in order to raise appropriate objections.
6. Before beginning cross-examination, a lawyer should ascertain whether the prosecutor has provided copies of all prior statements of the witnesses as required by applicable law. If the lawyer does not receive prior statements of prosecution witnesses until they have completed direct examination, the lawyer should request, at a minimum, adequate time to review these documents before commencing cross-examination.

7. At the close of the prosecution’s case, and out of the presence of the jury, a lawyer should move for a judgment of acquittal on each count charged. The lawyer should request, when necessary, that the court immediately rule on the motion in order for the lawyer may make an informed decision about whether to present a defense case.

Commentary:

The lawyer should be mindful of how cross-examination may affect the case and whether particular questions might “open the door” to otherwise inadmissible evidence. For example, where the defense attorney questioned the adequacy and thoroughness of the investigating officer’s interview of defendant—an interview that was cut short by the defendant’s invocation of the right to counsel—the prosecutor was allowed to respond by informing the jury that the detective was unable to conduct a more thorough inquiry because of that invocation.<sup>24</sup>

Cross-examination should be conducted purposefully to cast doubt on the state’s evidence or discredit a state’s witness and in all cases should be consistent with the defense theory of the case. Simply reiterating a witness’s direct examination is at best tedious and at worst strengthens the prosecution’s case in the mind of the trier of fact.

In preparing any topic or questions for cross examination, a lawyer should prepare the legal basis for asking the question and anticipate objections to admissibility. If the court prohibits questioning on a particular topic, a lawyer should make an appropriate record to preserve the error through an offer of proof.

**STANDARD 7.5 – PRESENTING THE DEFENSE CASE**

**A lawyer should be prepared to present evidence at trial where it will advance a defense theory of the case that best serves the interest of the client.**

Implementation:

1. A lawyer should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, a lawyer should consider whether the client’s interests are best served by not putting on a defense case and instead rely on the prosecution’s

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<sup>24</sup> *State v. Guritz*, 134 Or. App. 262 (1995).

failure to meet its constitutional burden of proving each element beyond a reasonable doubt.

2. A lawyer should discuss with the client all of the considerations relevant to the client's decision whether or not to testify.
3. A lawyer should be aware of the elements of any affirmative defense and know whether the client bears a burden of persuasion or a burden of production.
4. In preparing for presentation of a defense case, a lawyer should:
  - a. Develop a plan for direct examination of each potential defense witness and assure each witness's attendance by subpoena if necessary;
  - b. Determine the implications that the order of witnesses may have on the defense case;
  - c. Consider the possible use of character witnesses;
  - d. Consider the need for expert witnesses; and
  - e. Consider whether to present a defense based on mental disease, defect, diminished capacity or partial responsibility and provide notice of intent to present such evidence and consult with the client about the implications of an insanity defense.
5. In developing and presenting the defense case, a lawyer should consider the implications it may have for a rebuttal by the prosecutor.
6. A lawyer should prepare all witnesses for direct and possible cross-examination. Where appropriate, a lawyer should also advise witnesses of suitable courtroom dress and demeanor.
7. A lawyer should conduct redirect examination as appropriate.
8. At the close of the defense case, the lawyer should renew the motion for judgment of acquittal on each charged count.
9. A lawyer should be prepared to object to an improper state's rebuttal case and offer surrebuttal witnesses if allowed.

Commentary:

The Oregon Rules of Professional Conduct properly affirm the constitutional requirement that the client decides whether to testify or not. The lawyer must consult with the client concerning the risks and benefits of testifying. Whether to present other defense evidence, however, is a strategic and tactical decision to be made by the lawyer in consultation with the client. A lawyer should carefully consider the most effective defense presentation that advances the client's cause or whether the client is best served by not presenting evidence.

**STANDARD 7.6 – CLOSING ARGUMENT**

**A lawyer should be prepared to deliver a closing summation that presents the trier of fact with compelling reasons to render a verdict for the client based upon the evidence presented at trial and the law applicable to the case.**

Implementation:

1. A lawyer should be familiar with the substantive limits on both prosecution and defense summation.
2. A lawyer should be familiar with local rules and the individual judge's practice concerning time limits and objections during closing argument as well as provisions for rebuttal argument by the prosecution.
3. A lawyer should prepare the outlines of the closing argument prior to the trial and refine the argument at the end of trial by reviewing the proceedings to determine what aspects can be used in support of defense summation and, where appropriate, should consider:
  - a. Highlighting weaknesses in the prosecution's case;
  - b. Describing favorable inferences to be drawn from the evidence;
  - c. What the possible effects of the defense arguments are on the prosecutor's rebuttal argument; and
  - d. Incorporating into the argument:
    - 1) Helpful testimony from direct and cross-examinations;
    - 2) Verbatim instructions drawn from the jury charge; and
    - 3) Responses to anticipated prosecution arguments.



4. Whenever the prosecutor exceeds the scope of permissible argument, the lawyer should object, request a mistrial or seek cautionary instructions unless tactical considerations suggest otherwise.
5. In a delinquency case a lawyer should, where appropriate, ask the court, even if sufficient evidence is found to support jurisdiction, not to exercise jurisdiction and move to dismiss the petition (or defer finding jurisdiction until after the dispositional hearing) on the ground that jurisdiction is not in the best interests of the youth or society.

Commentary:

Because summation is an argument, parties will be given broad latitude in drawing inferences and suggesting conclusions. The closing should be tailored to the audience, where legal doctrines may better be emphasized in arguments to a judge, while jurors may be more receptive to arguments focused on the facts. Even in bench trials, it is good practice to prepare jury instructions and use them in preparing the closing argument.

The most likely areas for improper argument by the prosecution are discussion of facts not in evidence and unconstitutional comments on the defendant's right not to testify and attempts to impermissibly shift a burden of proof to the defense. A lawyer should be alert to such improper arguments and raise appropriate objections when they occur.

**STANDARD 7.7 – JURY INSTRUCTIONS**

**A lawyer should ensure that instructions to the jury correctly state the law and seek special instructions that provide support for the defense theory of the case.**

Implementation:

1. A lawyer should be familiar with the local rules and individual judges' practices concerning ruling on proposed instructions, charging the jury, use of standard charges and preserving objections to the instructions.
2. Where appropriate, a lawyer should submit modifications of the standard jury instructions in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense. When possible, a lawyer should provide case law in support of the proposed instructions.

3. A lawyer should object to and argue against improper instructions proposed by the court or prosecution.
4. If the court refuses to adopt instructions requested by the lawyer, or gives instructions over the lawyer's objection, the lawyer should take all steps necessary to preserve the record for appeal.
5. During delivery of the charge, the lawyer should be alert to any deviations from the judge's planned instructions, object to deviations unfavorable to the client and, if necessary, request additional or curative instructions.
6. If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, a lawyer should request that the judge state the proposed charge to the lawyer before it is delivered to the jury and take all steps necessary to preserve a record of objection to improper instructions.

Commentary:

Preservation of jury instruction error can be critical to a defense based on the misapplication of the law. Therefore, a lawyer should carefully review all proposed jury instructions, including uniform jury instructions and others proposed by the court or prosecution, to ensure that they accurately state the applicable law. However, if a jury instruction error is not objected to properly, a client may be deemed to have waived any objection.

**STANDARD 8.1 – OBLIGATIONS OF COUNSEL CONCERNING SENTENCING OR DISPOSITION**

**A lawyer must work with the client to develop a theory of sentencing or disposition and an individualized sentencing or disposition plan that is consistent with the client's desired outcome. The lawyer must present this plan in court and zealously advocate on behalf of the client for such an outcome.**

Implementation:

1. In every criminal or delinquency case, a lawyer should:

- a. Be knowledgeable about the applicable law governing the length and conditions of any applicable sentence or disposition, the pertinent sentencing or dispositional procedures, and inform the client at the commencement of the case of the potential sentence(s) or disposition for the alleged offense(s);
- b. Be aware of the client's relevant history and circumstances, including prior military service, physical and mental health needs, educational needs and be sensitive to the client's sexual orientation or gender identity to the extent this history or circumstance impacts sentencing or the disposition plan.
- c. Understand and advise the client concerning the availability of deferred sentences, conditional discharges, early termination of probation, informal dispositions, alternative dispositions including conditional postponement and diversion agreements (including servicemember status);
- d. Understand and explain to the client the consequences and conditions that are likely to be imposed as probation requirements or requirements of other dispositions and the potential collateral consequences of any sentence or disposition in a case, including the effect of a conviction or adjudication on a sentence for any subsequent crime;
- e. Be knowledgeable about treatment or other programs, out-of-home placement possibilities for juveniles, including: group homes, foster care, residential treatment programs or mental health treatment facilities, that may be required as part of disposition or that are available as an alternative to incarceration or out of home placement for youth, that could reduce the length of a client's time in custody or in out of home placement;
- f. Be knowledgeable about the requirements of placements that receive Title IV-E of the Social Security Act funding through contracts with the Juvenile Departments or the Department of Human Services and be able to request "no reasonable efforts" findings from the juvenile court when it would benefit the client;
- g. Develop a plan in conjunction with the client, supported where appropriate by a written memorandum addressing pertinent legal and factual considerations, that seeks the least restrictive and burdensome sentence or disposition, which can reasonably be obtained based upon the facts and circumstances of the case and that is acceptable to the client;
- h. Where appropriate, obtain assessments or evaluations that support the client's plan;

- i. Investigate and prepare to present to a prosecutor, when engaged in plea negotiations or to the court at sentencing or disposition, available mitigating evidence and other favorable information that might benefit the client at sentencing or disposition;
  - j. Ensure that the court does not consider inaccurate information or immaterial information harmful to the client in determining the sentence or disposition to be imposed;
  - k. Be aware of and prepare to address, express or implicit bias that impacts sentencing or disposition; and
  - l. Review the accuracy of any temporary or final sentencing or disposition order or judgments of the court and move the court to correct any errors that disadvantage the client.
2. In understanding the sentence or disposition applicable to a client's case, a lawyer should:
  - a. Be familiar with the law and any applicable administrative rules governing the length of sentence or disposition, including the Oregon Sentencing Guidelines as well as laws that establish specific sentences for certain offenses or for repeat offenders and be familiar with juvenile code and case law language that supports a less restrictive disposition that best meets the expressed needs of the youth;
  - b. Be knowledgeable about potential court-imposed financial obligations, including fines, fees and restitution, and, where appropriate, challenge the imposition of such obligations when not supported by the facts or law;
  - c. Be familiar with the operation of indeterminate dispositions and the law governing credit for pretrial detention, earned time credit, time limits on post-trial and post disposition juvenile detention and out-of-home placement, eligibility for correctional programs and furloughs, and eligibility for and length of post-prison supervision or parole from juvenile dispositions;
  - d. As warranted by the circumstances of a case, consult with experts concerning the collateral consequence of a conviction and sentence on a client's immigration status or other collateral consequences of concern to the client, e.g. civil disabilities, sex-offender registration, disqualification for types of employment, consequences for clients involved in the child welfare system, DNA and HIV testing, military opportunities, availability of public assistance, school loans and housing, and enhanced sentences for future convictions;

- e. Be familiar with statutes and relevant cases from state and federal appellate courts governing legal issues pertinent to sentencing or disposition such as the circumstances in which consecutive or concurrent sentences may be imposed or when offenses should merge for the purpose of conviction and sentencing;
  - f. Establish whether the client's conduct occurred before any changes to sentencing or dispositional provisions that increase the penalty or punishment to determine whether application of those provisions is contrary to statute or *ex post facto* prohibitions;
  - g. In cases where prior convictions are alleged as the basis for the imposition of enhanced repeat offender sentencing, determine whether the prior convictions qualify as predicate offenses or are otherwise subject to challenge as constitutionally or statutorily infirm;
  - h. Determine whether any mandatory sentence would violate the state constitutional requirement that the penalty be proportioned to the offense; and
  - i. Advance other available legal arguments that support the least restrictive and burdensome sentence.
3. In understanding the applicable sentencing and dispositional hearing procedures, a lawyer should:
- a. Determine the effect that plea negotiations may have on the sentencing discretion of the court;
  - b. Determine whether factors that might serve to enhance a particular sentence must be pleaded in a charging instrument and/or proven to a jury beyond a reasonable doubt;
  - c. Consult with the client concerning the strategic or tactical advantages of resolving factual sentencing matters before a jury, a judge or by stipulation;
  - d. Understand the availability of other evidentiary hearings to challenge inaccurate or misleading information that might harm the client, to present evidence favorable to the client, and ascertain the applicable rules of evidence and burdens of proof at such a hearing;
  - e. Determine whether an official presentence report will be prepared for the court and, if so, take steps to ensure that mitigating evidence and other favorable information is included in the report, that inaccurate or misleading information harmful to the client is deleted from it. Determine whether the client should participate in an interview with the report writer, advising the client concerning the interview and accompanying the client during any such interview;

- f. Determine whether the prosecution intends to submit a sentencing or dispositional memorandum, how to obtain such a document prior to sentencing or disposition and what steps should be followed to correct inaccurate or misleading statements of fact or law; and
  - g. Undertake other available avenues to present legal and factual information to a court or jury that might benefit the client and challenge information harmful to the client.
4. In advocating for the least restrictive or burdensome sentence or disposition for a client, a lawyer should:
- a. Inform the client of the applicable sentencing or dispositional requirements, options and alternatives, including liability for restitution and other court-ordered financial obligations and the methods of collection;
  - b. Maintain regular contact with the client before the sentencing or dispositional hearing and keep the client informed of the steps being taken in preparation for sentencing or disposition, work with the client to develop a theory for the sentencing or disposition phase of the case;
  - c. Obtain from the client and others information such as the client's background and personal history, prior criminal record, employment history and skills, current or prior military service, education and current school issues, medical history and condition, mental health issues and mental health treatment history, current and historical substance abuse history, and treatment, what, if any, relationship there is between the client's crime(s) and the client's medical, mental health or substance abuse issues, and the client's financial status and sources through which the information can be corroborated;
  - d. Determine with the client whether to obtain a psychiatric, psychological, educational, neurological or other evaluation for sentencing or dispositional purposes;
  - e. If the client is being evaluated or assessed, whether by the state or at the lawyer's request, provide the evaluator in advance with background information about the client and request that the evaluator address the client's emotional, educational and other needs as well as alternative dispositions that will best meet those needs and society's needs for protection;
  - f. Prepare the client for any evaluations or interviews conducted for sentencing or disposition purposes;
  - g. Be familiar with and, where appropriate, challenge the validity and/or reliability of any risk assessment tools;

- h. Investigate any disputed information related to sentencing or disposition, including restitution claims;
- i. Inform the client of the client's right to address the court at sentencing or disposition and, if the client chooses to do so, prepare the client to personally address the court, including advice of the possible consequences that admission of guilt may have on an appeal, retrial or trial on other matters;
- j. Ensure the client has adequate time prior to sentencing to examine any presentence or dispositional report, or other documents and evidence that will be submitted to the court at sentencing or disposition;
- k. Prepare a written disposition plan that the lawyer and the client agree will achieve the client's goals in a delinquency case and, in a criminal case, prepare a written sentencing memorandum where appropriate to address complex factual or legal issues concerning the sentence;
- l. Be prepared to present documents, affidavits, letters and other information, including witnesses, that support a sentence or disposition favorable to the client;
- m. As supported by the facts and circumstances of the case and client, challenge any conditions of probation or post-prison supervision that are not reasonably related to the crime of conviction, the protection of the public or the reformation of the client;
- n. In a delinquency case, be prepared to present evidence on the reasonableness of Oregon Youth Authority, Juvenile Department or Department of Human Services efforts that could have been made concerning the disposition and, when supported by the evidence, request a "no reasonable efforts" finding by the court;
- o. In a delinquency case, after the court has found jurisdiction, move the court, when supported by the facts, to not exercise jurisdiction and dismiss the petition, amend the petition or find jurisdiction on fewer than all charges, on the ground that jurisdiction is not in the best interests of the youth or society;
- p. When the court has the authority to do so, request specific orders or recommendations from the court concerning the place of confinement, parole eligibility, mental health treatment or other treatment services, and permission for the client to surrender directly to the place of confinement;
- q. Be familiar with the obligations of the court and district attorney regarding statutory or constitutional victims' rights and, where appropriate, ensure that the record reflects compliance with those obligations;
- r. Take any other steps that are necessary to advocate fully for the sentence or disposition requested by the client and to protect the interests of the client; and

- s. Advise the client about the obligations and duration of sentence or disposition conditions imposed by the court, and the consequence of failure to comply with orders of the court. In a delinquency case, where appropriate, counsel should confer with the client's parents regarding the disposition process to obtain their support for the client's proposed disposition.

Commentary:

In the vast majority of criminal and delinquency cases, there will be a sentencing or disposition hearing and it will be the most significant event in the case. An indispensable first step, in being a good advocate at this stage of a case, is education so that the lawyer has a good working knowledge and access to resources on what is often an ever-changing array of available sentencing and dispositional options. A lawyer should plan for this stage of the case at or near the beginning of representation. That planning will ordinarily require an in-depth interview of the client, and if appropriate, the client's parent or custodian, legal research concerning the applicable terms and conditions of sentencing or dispositional options, discussions with the client about his or her preferred option and a realistic portrayal of the various possibilities, and an investigation into factual matters, such as evidence of aggravating or mitigating factors, that may affect the outcome.

Sentencing and dispositional considerations have long been matters that should take place in the context of an overall plan for achieving the client's stated objectives for the case that works in concert with the handling of plea negotiations and the preparation and presentation of the case at trial. Several developments or trends, some pulling in opposite directions, make a coordinated case approach especially imperative.

First, in criminal cases, the potential role of juries in sentencing hearings weighs in favor of a thoughtful approach to the conduct of a trial if the same jury is reasonably likely to later consider some sentencing matters. Meanwhile, the continued viability of "mandatory minimum" laws in Oregon, which place considerably control over case outcomes in the hands of prosecutors, weighs in favor of an early and vigorous investigation of both the underlying allegations and any available mitigation evidence in order for the lawyer to put the client in the best possible position for plea negotiations with the prosecutor.

In juvenile delinquency cases, the court has broad discretion and will receive reports from the Juvenile Court Counselor and the Department of Human Services caseworker or Oregon Youth Authority parole officer if the Department of Human Services or the Oregon Youth Authority are involved. These reports can be cookie cutter and often view the delinquent



from a social worker perspective that can lead to overreaching into the lives of the client and the client's family. Counsel for the youth should advocate for a client-driven disposition plan that is individualized and tailored to the offense and not overly expansive. A written client driven disposition plan is the only effective way of countering the written plans of government agents. A written disposition plan should always be requested as part of any evaluation. In complex cases, the assistance of a qualified social worker can be obtained to help develop the client-driven disposition plan.

The proliferation and significance of collateral consequences of both criminal and delinquency adjudications also require an informed, vigorous and coordinated approach to sentencing and disposition. It is now better understood that the non-penal consequences of a conviction or adjudication, such a deportation or the loss of employment, housing, public assistance or opportunities for service in the military, may be of greater significance to a client than the time he or she spends in custody or out of the home. Some of these consequences may be triggered by the offense of conviction or adjudication, while others may be triggered by the duration or conditions of sentencing or disposition. The lawyer is now obligated to understand these consequences and conduct the defense in order to avoid or mitigate their impact.

Since the last revision of these standards, there is increased interest by courts and community corrections officials in "smart sentencing," with an emphasis on evidence-based practices that are known to be effective in reducing recidivism. Even without major legislative reforms that embrace this new focus, there are opportunities for clients to benefit from research about what sentencing or dispositional elements work best to protect the public. Lawyers handling criminal and delinquency cases, therefore, should be knowledgeable about the research and its possible application in their cases. To the extent that implementation of evidence based practices also relies upon the use of risk assessment tools, counsel should be aware of the tools used in reports considered by the court at sentencing or disposition and be prepared to challenge the validity and reliability of them, both facially and as applied to a client, where appropriate.

Because sentencing and disposition are subject to frequent legislative attention and vigorous litigation in the trial and appellate courts, lawyers representing clients in both criminal and delinquency cases must stay current with the latest developments in the law and be prepared to undertake litigation on issues such as the retroactive application of changes in punishment, the validity of prior convictions that trigger sentence enhancements, the merger of convictions and the proportionality of punishment.

Finally, lawyers representing youth should take special care to confer with clients in developmentally appropriate language about disposition planning. Although a lawyer must make clear to the client and the client’s parents that the youth controls decisions concerning disposition options, to the extent appropriate and with the permission of the youth, a lawyer should explain the disposition process to parents and enlist their support of the youth’s choices. The plan submitted to the court by the lawyer, which ordinarily should be in writing, should address the youth’s strengths and particular medical, mental health, educational or other needs, and the use of available resources in the home, the community or elsewhere through which the client is most likely to succeed.

### **STANDARD 9.1 – CONSEQUENCES OF PLEA ON APPEAL**

**In addition to direct and collateral consequences, a lawyer should be familiar with, and advise the client of, the consequences of a plea of guilty, an admission to juvenile court jurisdiction or a plea of no contest on the client’s ability to successfully challenge the conviction, juvenile adjudication, sentence or disposition in an appellate proceedings.**

#### Implementation:

1. A lawyer should be familiar with the effects of a guilty plea, admission to juvenile court jurisdiction or a no contest plea on the various forms of appeal.
2. During discussions with the client regarding a possible admission, plea of guilty or no contest, a lawyer must inform the client of the consequences of such a plea on any potential appeals.
3. A lawyer should be familiar with the procedural requirements of the various types of pleas, including the conditional guilty plea, that affect the possibility of appeal.

#### Commentary:

A plea of guilty or no contest severely limits the scope of a client’s direct appeal. A defendant who has pleaded guilty or no contest must identify a “colorable claim of error” simply in order to file a notice of appeal.<sup>25</sup> Even if the client satisfies that procedural hurdle, in cases in which the client pled guilty or pled no contest, the Court of Appeals is limited by

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<sup>25</sup> ORS 138.050 (2001).

statute to reviewing only the sentence imposed by the court.<sup>26</sup> Although ORS 138.050 does not limit appeals in juvenile cases, and thus there is no requirement that “a colorable claim of error” be identified, as a practical matter the client’s admission to facts constituting jurisdiction greatly limits the scope of appeal.

## **STANDARD 9.2 – PRESERVATION OF ISSUES FOR APPELLATE REVIEW**

**A lawyer should be familiar with the requirements for preserving issues for appellate review. A lawyer should discuss the various forms of appellate review with the client and apprise the client of which issues have been preserved for review.**

### Implementation:

1. A lawyer must know the requirements for preserving issues for review on direct appeal and in federal habeas corpus proceedings.
2. A lawyer should review with the client those issues that have been preserved for appellate review and the prospects for a successful appeal.

### Commentary:

A trial lawyer faces the often-challenging task of zealously advocating for the best result for her client at trial while simultaneously preserving legal issues for later challenge on appeal in the event of conviction or adjudication. Some issues require only an objection from the lawyer sufficient to alert the court to the issue and the client’s position in order to preserve the issue for appellate review.<sup>27</sup>

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<sup>26</sup> ORS 138.050 (2001). See, *State v. Anderson*, 113 Or. App. 416, 419, 833 P2d 321 (1992) (“[A] disposition is legally defective and, therefore, exceeds the maximum allowable by law if it is not imposed consistently with the statutory requirements.”)

<sup>27</sup> *State v. Wyatt*, 331 Or. 335, 15 P3d 22 (2000).

However, other types of issues require additional steps to be taken. For example, if the trial court excludes evidence over the objection of the lawyer, the lawyer often must make an offer of proof to the court detailing what the evidence would have been so that appellate courts can determine the merits of the legal issue and the harm of the exclusion.<sup>28</sup>

Another example of a more complex preservation requirement involves arguments for or against proposed jury instructions. ORCP 59H, which applies to criminal trials through ORS 136.330(2), requires a party to state its objections to the giving of an instruction (or the failure to give an instruction) “with particularity” and to except after jury instructions have been delivered.

A lawyer’s most important goal at trial is to obtain a favorable ruling for her client. Should that effort fail, the lawyer must insure that she has met the specific requirements for preserving the issue for appellate review should the client decide to appeal the conviction, adjudication, sentence or disposition.

As a subset of the duty to keep the client informed, a lawyer should discuss with the client the various forms of appeal, including the right to a de novo rehearing by a judge of a juvenile adjudication by a referee and the specific issues presented in the client’s case that could be pursued on appeal. The lawyer should advise the juvenile client that the time to file an appeal of an adjudication starts running from the time of the adjudication, not the disposition, and if necessary a separate appeal of the disposition can be filed.<sup>29</sup>

### **STANDARD 9.3 -UNDERTAKING AN APPEAL**

**A lawyer must be knowledgeable about the various types of appeals and their application to the client’s case and should impart that information to the client. A lawyer should inquire whether a client wishes to pursue an appeal. When requested by the client, a lawyer should assure that a notice of appeal is filed and that the client receives information about obtaining appellate counsel.**

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<sup>28</sup> OEC 103(1)(b)(“Error may not be predicated upon a ruling which \* \* \* excludes evidence unless a substantial right of a party is affected” and “the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.”); *State v. Bowen*, 340 Or. 487, 500, 135 P3d 272 (2006) (“[A]n offer of proof ordinarily is required to preserve error when a trial court excludes testimony.”); see also *State v. Wirfs*, 250 Or. App. 269, 274, 281 P3d 616 (2012) (defendant not required to make an offer of proof “because the trial court and the prosecutor were aware of the substance of the testimony that defendant would elicit.”).

<sup>29</sup> *State ex rel Juv Dep. V. J.H.-O.*, 223 Or. App. 412 (2008).

### Implementation:

1. Throughout the trial proceedings, but especially upon conviction, adjudication, sentencing and disposition, a lawyer should discuss with the client the various forms of appellate review and how they might benefit the client.
2. If the client chooses to pursue a re-hearing of a juvenile referee's order or an appeal, a lawyer should take appropriate steps to preserve the client's rights, including requesting a re-hearing, filing notice of appeal or referring the case to an appellate attorney or public defender organization to have the notice of appeal filed.
3. When the client pursues an appeal, a lawyer should cooperate in providing information to the appellate lawyer concerning the proceedings in the trial court. A trial lawyer must provide the appellate lawyer with all records from the trial case, the court's final judgment and any other relevant or requested information.
4. If a lawyer is representing a client who is financially eligible for appointed counsel, the lawyer shall determine whether the client wishes to pursue an appeal and, if so, transmit to the Office of Public Defense Services the information necessary to perfect an appeal, pursuant to ORS 137.020(6).
5. If the client decides to appeal, a lawyer should inform the client of the possibility of obtaining a stay pending appeal and file a motion in the trial court if the client wishes to pursue a stay.

### Commentary:

If the client has been convicted despite the best efforts of a lawyer, a lawyer must discuss the various methods of appealing the conviction or adjudication and resulting sentence or disposition that are available to the client, including rehearing, direct appeal, post-conviction relief and a petition for federal habeas corpus. Each of those forms of appeal has unique applications and requirements and the client should be informed of the potential benefits and disadvantages of all types of appeal. In particular, a lawyer should review filing deadlines and requirements to insure the client does not lose the opportunity to pursue an appeal.

A lawyer is constitutionally mandated to confer with the client about the right to appeal.<sup>30</sup> A lawyer should explain both the meaning and consequences of the court's decision and provide the client with the lawyer's professional judgment regarding whether there are meritorious grounds for appeal and the probable consequences of an appeal, both good and bad.

There may be circumstances in which a lawyer should file a notice of appeal on behalf of the client to preserve the client's right to appeal in the face of a looming deadline, despite the fact that the lawyer will not eventually represent the client on appeal. The preferred course of action is to refer the case to the attorney or organization that will represent the client on appeal in time to allow that lawyer or entity to timely file notice of appeal. However, the primary concern is that the client's right to appeal is preserved.

Communication between lawyers who represent the client at the various stages of a criminal or delinquency case (trial, direct appeal, post-conviction relief, etc.) is critical to the client's success. That is particularly true of communication between a client's trial lawyer and the lawyer helping the client file a petition for post-conviction or post-adjudication relief.

## **STANDARD 9.4 – POST SENTENCING AND DISPOSITION PROCEDURES**

**A lawyer should be familiar with procedures that are available to the client after disposition. A lawyer should explain those procedures to the client, discern the client's interests and choices and be prepared to zealously advocate for the client.**

### Implementation:

1. Upon entry of judgment, a lawyer should immediately review the judgment to ensure that it reflects the oral pronouncement of the sentence or disposition and is otherwise free of legal or factual error. In a delinquency case, a lawyer should insure that the judgment includes the disposition probation plan, including any actions to be taken by parents, guardians or custodians.

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<sup>30</sup> *Roe v. Flores-Ortega*, 528 U.S. 470, 480, 120 S. Ct. 1029, 145 L. ed. 2d 985 (2000) (“We instead hold that counsel has a constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.”)

2. The lawyer must be knowledgeable concerning the application and procedural requirements of a motion for new trial or motion to correct the judgment.
3. The lawyer representing a youth in delinquency proceedings should be versed in relevant case law, statutes, court rules and administrative procedures regarding the enforcement of disposition orders, as well as the methods of filing motions for post-disposition and post-adjudicatory relief, for excusal or relief from sex offender registration requirements, and/or to review, reopen, modify or set aside adjudicative and dispositional orders. For youth whose circumstances have changed; youth whose health, safety, and welfare is at risk; or youth not receiving services as directed by the court, a lawyer should file motions for early discharge or dismissal of probation or commitment, early release from detention, or modification of the court order. Where commitment is indeterminate and youth correctional authorities have discretion over whether and when to release a youth from secure custody, when the period of incarceration becomes excessive, the lawyer should advocate to terminate or limit the term of commitment, if desired by the youth.

Commentary:

In general, when the written judgment conflicts with the court's oral pronouncement of sentence at trial, the written judgment controls.<sup>31</sup> It is therefore imperative that the written judgment accurately reflects the favorable aspects of the sentence imposed by the court at the sentencing hearing.

Under ORCP 64 and ORS 136.535, a trial court may grant a motion for new trial if certain conditions are met, including irregularities in the proceedings, juror misconduct, or newly discovered evidence that could not have been discovered and produced at trial. Similarly, the trial court has the authority to correct an erroneous term in the judgment under ORS 138.083, even if the case is on appeal. The juvenile court may modify or set aside a jurisdictional order.<sup>32</sup> The lawyer should be knowledgeable about the availability and procedural requirements of these motions.

A lawyer should be familiar with the authority of a trial court to stay execution of the sentence, or part of a sentence, pending appeal and seek such relief where appropriate.

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<sup>31</sup> See *State v. Swain/Goldsmith*, 267 Or. 527, 530, 517 P2d 684 (1974); *State v. French*, 208 Or. App. 652, 655, 145 P3d 305, 307 (2006); *State v. Mossman*, 75 Or. App. 385, 388, 706 P2d 203 (1985).

<sup>32</sup> ORS 419C.610 (2001).

## **STANDARD 9.5- MAINTAIN REGULAR CONTACT WITH YOUTH FOLLOWING DISPOSITION**

- A. A lawyer for a youth in delinquency proceedings should stay in contact with the youth following disposition and continue representation while the youth remains under court or agency jurisdiction.**
- B. A lawyer should inform a youth of procedures available for requesting a discretionary review of, or reduction in, the sentence or disposition imposed by the trial court, including any time limitations that apply to such a request.**

### **Implementation:**

1. The lawyer should reassure a youth that the lawyer will continue to advocate on the youth's behalf regarding post-disposition hearings, including probation reviews and probation or parole violation hearings, challenges to conditions of confinement and other legal issues, especially when the youth is incarcerated. The lawyer should also provide advocacy to get the client's record expunged or to obtain relief from sex offender registration.
2. Lawyers for youth convicted as adults but who were under 18 years of age at the time of the offense should be familiar with and inform the client of the "second look" provisions of ORS 420A.203 and ORS 420A.206.

### **Commentary:**

Post-disposition access to counsel is critical for youth under the continuing jurisdiction of the court or a state agency. Issues such as significant waiting lists for residential facilities, the failure to provide services ordered by the court, conditions of confinement and enforcement of disposition requirements require the legal acumen and advocacy of counsel.

In addition, a lawyer should check in periodically with the youth and routinely ensure that the facility or agency is adhering to the court's directives and that the youth's needs are met and the client's health, welfare and safety are protected.

Special attention is required to insure that secure facilities are providing educational, medical and psychological services.



If the youth is committed to a state agency, a lawyer should maintain regular contact with the caseworker, juvenile court counselor, youth correctional facility staff or juvenile parole officer, advocate for the youth as necessary and ask to be provided copies of all agency reports documenting the youth's progress. A lawyer should participate in case review meetings and administrative hearings. When appropriate, the lawyer should request court review to protect the client's right to treatment.

The lawyer may be the youth's only point of contact within the community when the youth is placed in a residential or correctional facility. The lawyer should advocate for adequate contact between the youth and his or her family and home visits when appropriate, if desired by the youth.



